Supreme Court, U.S.
FILED
051401 MAY 4 - 2006
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

VICTORIA TCHOUKHROVA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PATRICIA A. MILLETT
Assistant to the Solicitor General
DONALD E. KEENER
MARGARET PERRY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding, in the first instance and without prior resolution of the question by the Attorney General, that a parent may qualify for asylum and withholding of removal based solely on alleged persecution of her child.

2. Whether the court of appeals erred in resolving all of the remaining issues in the case rather than remanding them to the Attorney General for further consideration.

PARTIES TO THE PROCEEDING

The petitioner in this Court is the Attorney Genera of the United States, Alberto R. Gonzales. The respondents are Victoria Tchoukhrova, Dimitri Tchoukhrova and Evgueni Tchoukhrova, who were petitioners in the court of appeals.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory provisions involved 2
Statement 2
Reasons for granting the petition 14
Conclusion 24

TABLE OF AUTHORITIES

Cases:

Acosta, In re, 19 I. & N. Dec. 211 (BIA 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987) 4

Blazina v. *Bouchard*, 286 F.2d 507 (3d Cir.), cert. denied, 366 U.S. 950 (1961) 5

FPC v. *Idaho Power Co.*, 344 U.S. 17 (1952) 15

Fatin v. *INS*, 12 F.3d 1233 (3d Cir. 1993) 5

Florida Power & Light Co. v. *Lorion*, 470 U.S. 729 (1985) 15

Ghaly v. *INS*, 58 F.3d 1425 (9th Cir. 1995) 5

Gonzales v. *Thomas*, 126 S. Ct. 1613 (2006) ..... *passim*

INS v. *Abudu*, 485 U.S. 94 (1988) 21

INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 14, 21

INS v. *Elias-Zacarias*, 502 U.S. 478 (1992) 18

INS v. *Ventura*, 537 U.S. 12 (2002) ..... *passim*

Reno v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) 22

SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 16

Villalta, In re, 20 I. & N. Dec. 142 (BIA 1990) 4

Statutes and regulations: Page

Homeland Security Act Amendments of 2003, Pub. L. No. 108-7, Div. L, § 105(1), 117 Stat. 531 3
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2
8 U.S.C. 1101(a)(1) 3
8 U.S.C. 1101(a)(42)(A) 4
8 U.S.C. 1103(a)(1) (2000 & Supp. II 2002) 3
8 U.S.C. 1158(b)(1)(A) 4
8 U.S.C. 1158(b)(3) (Supp. II 2002) 12, 20
8 U.S.C. 1158(b)(3)(A) (Supp. II 2002) 6
8 U.S.C. 1229a(a)(1) 3
8 U.S.C. 1231(b)(3)(A) (Supp. II 2002) 4
8 U.S.C. 1252(d)(1) 17
8 U.S.C. 1252(b)(4)(B) 18
REAL ID Act, Pub. L. No. 109-13, Div. B, § 101(a), 119 Stat. 302 4
6 U.S.C. 271(b)(3) (Supp. II 2002) 3
8 C.F.R.:
Section 207.7(b)(6) 6, 12, 20
Section 208.2(a) 3
Section 208.4(b) 3
Section 208.9(a) 3
Section 241.6 21
Section 1003.1 4
Section 1003.1(h) 4
Section 1208.13(b) 5
Section 1208.13(b)(1) 5

Regulations—Continued: Page

Section 1208.13(b)(1)(i)(A) 5
Section 1208.13(b)(2)(i)(A) 5
Section 1208.13(b)(2)(i)(A)-(C) 5
Section 1208.16(b)(1) 5
Section 1208.16(b)(2) 5
Section 1208.16(b)(1)(i)(A)-(B) 6
Section 1208.21(a)-(g) 6
Section 1240.1(a)(1) 4
Section 1240.15 4

Miscellaneous:

Asylum Procedures, 65 Fed. Reg. 76,127 (2002) 5
United States Court of Appeals for the Ninth Circuit, *Media Access* <http://www.ca9.uscourts.gov/ca9/media.nsf/Media%20 Search?> 11

In the Supreme Court of the United States

No.

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

VICTORIA TCHOUKHROVA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, Alberto R. Gonzales, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 404 F.3d 1181. The order of the court of appeals denying the petition for rehearing (Pet. App. 41a-51a) is reported at 430 F.3d 1222. The order of the Board of Immigration Appeals (Pet. App. 28a-29a), and the decision of the immigration judge (Pet. App. 30a-40a), are unreported.

JURISDICTION

The court of appeals entered its judgment on April 21, 2005. A petition for rehearing was denied on December 5, 2005. On February 23, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including April 4, 2006. On March 27, 2006, Justice Kennedy further extended the time for filing a petition for a writ of certiorari to and including May 4, 2006. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the separately bound appendix to this petition at 52a-55a.

STATEMENT

In this case, the Ninth Circuit held that respondent Victoria Tchoukhrova qualified as a "refugee" under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, based exclusively on persecution allegedly suffered not by her, but by her child. The court then held that Tchoukhrova could accord derivative asylum and withholding of removal back to her child and to her spouse. In addition, the court decided de novo that the government could not rebut a presumption of a well-founded fear of future persecution that arose only after the court found past persecution on the basis of its new imputation rule. In so doing, the Ninth Circuit acknowledged that neither the derivative eligibility nor the future persecution question had been decided by the immigration judge or the Board of Immigration Appeals. Nevertheless, the court definitively resolved those ques-

tions rather than remanding, as required by *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam).

This Court recently reconfirmed the erroneousness of the Ninth Circuit's approach, reiterating that courts of appeals may not raise and resolve questions of immigration law that have not been addressed by the Attorney General, and summarily reversing an en banc decision of the Ninth Circuit that ignored that principle. *Gonzales* v. *Thomas*, 126 S. Ct. 1613 (2006) (per curiam). The court of appeals' commission here of the same error it made in *Thomas* and *Ventura* on questions of immigration law that are of substantial and potentially far-reaching importance merits the same summary disposition as *Thomas* and *Ventura*, or, at a minimum, a vacatur and remand in light of *Thomas*.

1. a. Congress has charged the Secretary of Homeland Security (Secretary) "with the administration and enforcement of [the Immigration and Nationality Act] and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. 1103(a)(1) (2000 & Supp. II 2002), as amended by the Homeland Security Act Amendments of 2003, Pub. L. No. 108-7, Div. L, § 105(1), 117 Stat. 531. Congress vested the Secretary with the authority to make asylum determinations for aliens who are not in removal proceedings. 6 U.S.C. 271(b)(3) (Supp. II 2002); see also 8 C.F.R. 208.2(a), 208.4(b), 208.9(a).

The Attorney General is responsible for conducting the adjudication of admininstrative removal proceedings against an alien charged by the Department of Homeland Security with being removable. 8 U.S.C. 1101(a)(1), 1229a(a)(1). Removal hearings are conducted by immigration judges in the Executive Office for Immigration

Review within the Department of Justice, and the Board of Immigration Appeals (Board) hears appeals from decisions of the immigration judges. See 8 C.F.R. 1003.1, 1240.1(a)(1), 1240.15. The Attorney General has the authority to review any decision of the Board. 8 C.F.R. 1003.1(h).

b. An alien may be granted asylum, in the Attorney General's discretion, if "the Attorney General determines that such alien is a refugee," and the "alien * * * has applied for asylum in accordance with the requirements and procedures established by the Attorney General." 8 U.S.C. 1158(b)(1)(A), as amended by the REAL ID Act, Pub. L. No. 109-13, Div. B, § 101(a), 119 Stat 302. The INA defines a "refugee" as a person who is unwilling or unable to return to his or her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). In addition to discretionary asylum, mandatory withholding of removal from a particular country is available if the alien's "life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A) (Supp. II 2002).

For purposes of both forms of protection from removal, "persecution" refers to the infliction of significant mistreatment by either the government of the applicant's country of origin or by groups or individuals whom the government is unable or unwilling to control. See *In re Villalta*, 20 I. & N. Dec. 142, 147 (BIA 1990); *In re Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985), overruled in part on other grounds by *In re Mogharrabi*, 19

I. & N. Dec. 439 (BIA 1987). "Discrimination * * * as morally reprehensible as it may be, does not ordinarily amount to 'persecution' within the meaning of the [INA]." *Ghaly* v. *INS*, 58 F.3d 1425, 1431 (9th Cir. 1995). "[M]ere 'repugnance of . . . a governmental policy to our own concepts of . . . freedom' [is] not sufficient to justify labelling that policy as persecution." *Fatin* v. *INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (Alito, J.) (quoting *Blazina* v. *Bouchard*, 286 F.2d 507, 511 (3d Cir.), cert. denied, 366 U.S. 950 (1961)).

c. Regulations adopted by the Attorney General generally require an individual's eligibility for refugee status to be established based on persecution that is specific to and directed at that individual. For example, the applicant must prove that "*he or she* has suffered past persecution or * * * has a well-founded fear of future persecution." 8 C.F.R. 1208.13(b), (b)(1) and (2)(i)(A) (emphasis added). Furthermore, "well-founded fear" is defined in terms of the fear of the applicant. 8 C.F.R. 1208.13(b)(2)(i)(A)-(C). A presumption of a well-founded fear of future persecution arises if the applicant establishes that "*he or she* has suffered persecution in the past," 8 C.F.R. 1208.13(b)(1) (emphasis added), and the presumption may be rebutted by showing "a fundamental change," 8 C.F.R. 1208.13(b)(1)(i)(A), in the applicant's "personal circumstances" or in country conditions, *Asylum Procedures*, 65 Fed. Reg. 76,127 (2002). The presumption may also be rebutted by showing that "the applicant" could avoid future persecution by relocating to another part of his or her country. 8 C.F.R. 1208.13(b)(1)(i)(B).

Similarly, to be eligible for withholding of removal, "the applicant" must prove that "*his or her* life or free-

dom would be threatened," meaning it is more likely than not that "*he or she* would be persecuted." 8 C.F.R. 1208.16(b)(1) and (2) (emphases added). If "the applicant" is found to have experienced past persecution, there is a presumption of a future threat to life or freedom. 8 C.F.R. 1208.16(b) (1)(i)(A)-(B). As in asylum cases, this presumption can be rebutted if there is either "a fundamental change in circumstances" or "[t]he applicant" could relocate elsewhere in his or her country to avoid future persecution. *Ibid.*

Congress has created one exception to the requirement of individualized persecution. Derivative asylum permits a "spouse or child * * * of an alien who is granted asylum" to be "granted the same status as [that] alien if accompanying, or following to join such alien." 8 U.S.C. 1158(b)(3)(A) (Supp. II 2002). The Attorney General, through regulations, has hewed to Congress's terms and has limited derivative asylum to only the "spouse" or "child" of the persecuted individual, and has expressly precluded derivative asylum based on all other familial relations, including status as a "parent." 8 C.F.R. 1208.21(a)-(g); 8 C.F.R. 207.7(b)(6). Neither Congress nor the Attorney General has recognized any form of derivative relief for withholding of removal.

2. Victoria Tchoukhrova is a female native of Russia who, in 2001, applied for asylum as the principal applicant, with her spouse and son as derivative asylum applicants only. Pet. App. 31a, 51a-52a; Admin. Rec. 73-74 (Tr. 7-8); Gov't C.A. Br. 4. She asserted persecution on the basis of political opinion due to her opposition to Russia's lack of equal and mainstreamed treatment for persons with disabilities. See Pet. App. 6a, 8a.

Tchoukhrova's son, Evgueni, was born with cerebral palsy. Pet. App. 2a. Over the parents' objection, Russian officials transferred the infant to a government hospital for children with birth defects. Admin. Rec. 95 (Tr. 28). Evgueni's parents later procured his release and placed him in a private hospital. *Id.* at 100 (Tr. 33); see Pet. App. 3a-4a. When Evgueni was one year old, his personal pediatrician in a government hospital diagnosed him with infantile cerebral palsy. Admin. Rec. 100-101 (Tr. 33-34).

In 1994, Victoria Tchoukhrova traveled to the United States to obtain specialized treatment for Evgueni at an osteopathic center that had been recommended to her by a private clinic in Vladivostok. Admin. Rec. 144 (Tr. 77). Upon their return to Russia, the parents chose not to have Evgueni vaccinated, based on the advice of a doctor at the American osteopathic clinic. The Russian government continued to provide medical treatment to Evgueni, but, apparently, his parents' opposition to having him vaccinated made it more difficult for him to obtain medical care within state-run medical facilities. Evgueni was also denied access to public schools due to his cerebral palsy. Pet. App. 4a, 35a. Russian officials, instead, provided him with a visiting teacher. Admin. Rec. 333.

At the hearing before an immigration judge, Victoria Tchoukhrova testified that, because of "societal prejudice against the disabled in Russia," Pet. App. 5a, Evgueni was subjected to comments and the reactions of private individuals based on uninformed fears or misconceptions about cerebral palsy. She also discussed two incidents, not mentioned in her asylum application, that caused injuries when the boy was six years old. *Ibid.* In

one incident, several men grabbed Evgueni in a park and started dragging him toward a lake. When Victoria ran toward them, they dropped Evgueni, he hit his head on the ground, and he sustained injuries that required two months' hospitalization. Admin. Rec. 119-121, 140-141, 145-146 (Tr. 52-54, 73-74, 79-80). In the second incident, Evgueni was playing at a playground near a woman's laundry and occasionally touched it. The woman became angry, called Evgueni a "moron," and pushed Evgueni toward Tchoukhrova, telling her to take him away. He fell and hit his head, which required medical attention. Admin. Rec. 126-127, 141 (Tr. 59-60, 74). The parents filed police reports following both of those incidents, but the police did not investigate. Pet. App. 5a, 36a.

Tchoukhrova further asserted that, after she and her husband engaged in political action to pressure the Russian government to accord better treatment to disabled children, she was harassed, discriminated against, and threatened by local officials and members of the public. After a few years of political activity, the family left for the United States and entered as non-immigrant visitors. Pet. App. 6a-7a, 31a.

3. Victoria Tchoukhrova thereafter sought asylum and withholding of removal, and sought relief for her spouse and son as derivative applicants. Pet. App. 8a, 32a. She asserted persecution on the basis of political opinion—specifically, her opposition to the government's treatment of individuals with disabilities—and membership in a particular social group, identified as "a family with a child who has a debilitating disability known as cerebral palsy." *Id.* at 34a.

The immigration judge found the Tchoukhrovas to be removable and ineligible for asylum and withholding of removal. Pet. App. 30a-40a. The immigration judge found that Victoria Tchoukhrova and her family "did suffer harm in Russia" as a result of being members of a family with a child who has a debilitating disability. *Id.* at 37a. The immigration judge found, however, that the harms did not rise to the level of persecution. *Ibid.* With respect to Evgueni, the immigration judge reasoned that the "the facts in this case" indicate that "the Russian government does not have sufficient resources to provide adequate schooling for handicapped children" or "to provide medical attention to individuals at the same standards as in developed nations." *Id.* at 37a-38a; see also *id.* at 35a ("[T]he testimony clearly showed that her child did receive medical treatment. The respondent did not agree with the medical treatment given to her child."). With respect to Tchoukhrova's allegation that her husband was laid off from his job and that private individuals threw stones at her after she attended a meeting for families of children with disabilities, the immigration judge concluded that "[t]here was truly no connection between these incidents or harm and any of the grounds stated in the asylum statute." *Id.* at 37a.

Finally, although Tchoukhrova expressed concern about being killed or imprisoned if returned to Russia, the immigration judge found that her assertion "lacked any factual basis," that the family had lived in Russia "for a substantial period of time without being placed under arrest," that the family was allowed to live together and care for the child, and that she had been permitted to leave Russia three times to obtain medical treatment abroad for Evgueni. Pet. App. 39a. Thus,

while the immigration judge acknowledged the existence of discrimination against individuals with disabilities in Russia, he concluded that the "discrimination does not rise to the level of persecution," and "there has been no proof that either the respondent, her husband, or her child, suffered past persecution on account of any of the grounds stated in the asylum statute." *Ibid.*

The Board of Immigration Appeals affirmed in a brief order. Pet. App. 28a-29a. The Board explained that, "[w]hile the respondents present a very sympathetic family history," Victoria Tchoukhrova had failed to "adequately demonstrate[] that she was a victim of past persecution on account of political opinion or membership in a particular social group or that she has a well-founded fear or faces a clear probability of such persecution." *Id.* at 29a.

4. The court of appeals reversed, holding that Victoria Tchoukhrova is eligible for asylum and withholding of removal, and that her eligibility could extend derivatively to her child and spouse. Pet. App. 1a-27a. The court held that Tchoukhrova was eligible for asylum and qualified as a refugee based on her son's persecution, even if she had not herself been persecuted and was not independently eligible for asylum. The court held that federal immigration law required the immigration judge to "[i]mput[e] the disabled child's harms to the parent filing an application for asylum on behalf of the family," *id.* at 16a, and to apply the law as though "the parents and their disabled child incur the harm as a unit," *id.* at 14a.

In so doing, the court recognized that, while federal statutory law permits minor children to obtain asylum derivatively through their parents, "there is no compa-

rable provision permitting parents to obtain that relief derivatively through their minor children." Pet. App. 17a. The court also acknowledged that neither the Board nor the immigration judge "discuss[ed] the question expressly" of whether the harms suffered by a disabled child may be imputed to the parent. *Id.* at 15a. The court nevertheless chose to resolve that question and held that adopting a rule of child-to-parent imputation would "vindicate * * * basic principles and statutory purposes, and render[] the law consonant with both common sense and the important family values on which this nation prides itself." *Id.* at 16a-17a.[1]

The court of appeals next held that the record compelled the conclusion that Tchoukhrova's son, Evgueni, had suffered past persecution and faced a well-founded fear of future persecution. Pet. App. 19a-26a. From that finding, the court held that Victoria Tchoukhrova herself suffered persecution by imputation under its new rule, *id.* at 25a, and that this conclusion, in turn, triggered a regulatory presumption that Victoria Tchoukhrova also had a well-founded fear of future persecution, *ibid.*

The court refused to remand the case to the immigration judge to decide, in the first instance, whether that presumption could be rebutted by changed circum-

---

[1] At oral argument, the panel questioned whether Tchoukhrova or her son should be treated as the principal asylum applicant. See United States Court of Appeals for the Ninth Circuit, *Media Access* <http://www.ca9.uscourts.gov/ca9/media.nsf/Media%20Search?> (Case No. 03-71129) (audio file of oral argument). After Tchoukhrova's counsel described the derivative asylum scheme permitting Tchoukhrova, as a parent, to give asylum to her child, but not to get asylum from her child, one member of the panel suggested that the law needed some type of "reverse-derivative" status running from the child to the parents. *Ibid.*

stances or the possibility of relocation within Russia. In the court's view, remand was not required because the government had not argued either of those issues before "the agency—or to us." Pet. App. 26a. The court instead held, de novo, that the "presumption has not been, and cannot be, rebutted." *Ibid.* The court accordingly held that Victoria Tchoukhrova was eligible for asylum and withholding of removal and that her son and spouse were derivatively eligible. The court remanded with directions that the Tchoukhrovas be granted withholding of removal and for a discretionary asylum determination. *Ibid.*

5. The court of appeals denied the government's petition for rehearing and for rehearing en banc. Pet. App. 41a. Seven judges dissented from the denial of rehearing en banc, explaining that, by imputing the harm suffered by a child to a parent, the panel "in effect creates a reverse derivative asylum claim—something expressly barred by 8 C.F.R. § 207.7(b)(6)." *Id.* at 42a (Kozinski, J., joined by O'Scannlain, Tallman, Rawlinson, Bybee, Callahan, and Bea, JJ.). The decision to adopt such a rule, the dissent explained, "presents a question of exceptional importance with profound implications for our nation's immigration laws." *Ibid.* Yet the panel's "exotic reading of the immigration statute was never discussed by the IJ, the BIA or even the parties—rather, it is something that the panel comes up with on its own." *Ibid.* That manner of proceeding, the dissent emphasized, squarely conflicts with this Court's precedent:

> In *INS* v. *Ventura*, 537 U.S. 12, 15-17 (2002) (per curiam) (summary reversal), the Supreme Court told us in no uncertain terms that the agency charged

> with administering the statute gets first crack at ruling on its construction. It has taken us less than three years to work our way around this rule.

Id. at 42a-43a.

Furthermore, the dissent noted, the "statute is quite specific that only the spouse and children of a principal applicant are entitled to derivative status" and "[p]arents are expressly not." Pet. App. 47a (citing 8 U.S.C. 1158(b)(3) (Supp. II 2002); 8 C.F.R. 207.7(b)(6)). The panel's "strained" reading of immigration law "moots this carefully drawn statutory scheme." *Ibid.*

The dissent also rejected the panel's assertion "that the agency, in fact, has already done this," concluding that "it is clear from the record that the agency did nothing of the sort." Pet. App. 48a-49a. The dissent pointed out that this "sea-change in our immigration laws" was, in the panel's own words, adopted "[w]ithout [the Board or immigration judge] discussing the question expressly," and the panel's suggestion that the agency had somehow endorsed its approach depended entirely on "a stray phrase in the IJ's oral decision, which [the panel] rips out of context." *Id.* at 16a, 49a. In the dissent's view, "[i]t strains credulity to suggest that the IJ and the BIA would have adopted such a sweeping change to the interpretation of the immigration statute without thinking long and hard about what they were doing." *Id.* at 42a.

Rather, the dissent determined, the panel's rule of reverse derivative asylum "is all very new law," Pet. App. 47a, on a legal question that Supreme Court precedent requires be remanded "so the agency can, in the first instance, rule on the inventive arguments adopted by the panel, arguments that were neither raised below

nor by any of the other parties on appeal," *id.* at 51a The dissent concluded that "this decision is nothing bu a big end-run around *Ventura*." *Ibid.*[2]

REASONS FOR GRANTING THE PETITION

1. The decision of the Ninth Circuit usurps the Executive Branch's statutorily assigned role in interpreting and enforcing the immigration laws, and its constitutionally assigned role in making the sensitive domestic and foreign-policy judgments that inhere in identifying which individuals may receive refuge in the United States. The court's decision is only the latest installment in a continuing pattern by the Ninth Circuit of defying the most basic rules for judicial review of agency action and disregarding this Court's specific direction to hew to precedent demarcating the court's proper role. See *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam) (summarily reversing the Ninth Circuit for resolving legal and factual questions in the first instance); see also *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) (unanimously reversing the Ninth Circuit for failing to defer to the Attorney General's interpretation of federal immigration law); 05-552 Pet. at 16-18, *Gonzales* v. *Thomas*, 126 S. Ct. 1613 (2006) (cataloguing additional examples in the Ninth Circuit). And in this case, seven judges of that Circuit dissented from the denial of rehearing en banc because of the panel's refusal to remand, a point that the government brought to this Court's attention in *Thomas*, *supra*, as a further manifestation of the Ninth

---

[2] The dissent also noted that the panel, in the course of its opinion, had "accept[ed] as true certain [factual] allegations" that were not "presented at the hearing and that the IJ had no opportunity to adjudicate." Pet. App. 43a n.1.

Circuit's failure to follow *Ventura*. See 05-552 Reply Br. Pet. Stage at 1-2.

Three weeks ago, in *Thomas*, this Court summarily reversed an en banc decision of the Ninth Circuit for committing the same error that occurred here. The Court held that the Ninth Circuit "clearly violate[d]" the "ordinary remand rule" by deciding, in the first instance, that particular members of a family constituted a "particular social group" for purposes of the INA's definition of "refugee." 126 S. Ct. at 1614, 1615. The Court explained that the court of appeals' error was "'obvious in light of *Ventura*,' itself a summary reversal." *Id.* at 1614.

In so holding, this Court reiterated and reemphasized its holding in *Ventura* that, "[w]ithin broad limits," federal immigration law "entrusts the agency to make the basic asylum eligibility decision." *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 16). "A court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'" *Ibid.* (quoting *Ventura*, 537 U.S. at 16, and *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985)). Rather, "the function of the reviewing court ends when an error of law is laid bare." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). At that juncture, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 16, and *Florida Power & Light*, 470 U.S. at 744). A "judicial judgment cannot be made to do service for an administrative judgment." *Ibid.* (quoting *Ventura*, 537

U.S. at 16, and *SEC* v. *Chenery Corp.*, 318 U.S. 80, 8[illegible] (1943)).

Here, as in *Thomas*, the Ninth Circuit has reached out to create a new rule of immigration law that permits individuals to qualify for asylum and withholding of removal without personally being subjected to any persecution, through imputation of a child's persecution to a parent. The court's opinion confesses that it did so without the expert agency "discussing the question expressly." Pet. App. 15a. Indeed, as the dissent accurately noted, the panel created a rule of reverse derivative asylum without that argument even being raised by the parties. *Id.* at 42a.[3]

It therefore is clear here, as it was in *Thomas* and *Ventura*, that the court of appeals "should have applied the 'ordinary "remand" rule,'" *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 18), and allowed the Board to decide, in the first instance, whether harms suffered by a child may be imputed to a parent as perse-

---

[3] The panel asserted that it was only affirming the implicit position taken by the immigration judge and the Board below. See Pet. App. 11a, 19a. However, as the dissent noted, "the fact is, the IJ and the BIA did nothing like what the panel attributes to them; they'd surely be shocked at the suggestion that they did." *Id.* at 56a. The immigration judge's decision addressed and turned upon Victoria Tchoukhrova's claim that she had suffered political persecution. The immigration judge never held that alleged acts of persecution targeted at Evgueni could be imputed to his mother or deemed to be a form of persecution of the mother herself, nor did the immigration judge suggest that any form of derivative withholding of removal existed in the law. The Board, moreover, made clear that the only relevant question was whether the "lead respondent"—Victoria Tchoukhrova—had "adequately demonstrated that *she* was a victim of past persecution" on prohibited grounds or that "*she* has a well-founded fear or clear probability of such persecution." *Id.* at 29a (emphases added).

cution. Instead, the court proceeded to resolve that threshold legal question definitively, thereby establishing circuit-wide precedent.

2. The Ninth Circuit did not stop there. The court next held that the record compelled the conclusion that Evgueni had been subjected to "persecution" within the meaning of the Act, relying on unsubstantiated allegations in the record that the immigration judge did not rely upon in finding no persecution,[4] and ignoring other portions of the record in critical respects.[5] And the

---

[4] For example, although the panel stated that Evgueni was treated as "medical waste" after he was born, see Pet. App. 3a, 20a, the immigration judge made no finding about that allegation, which was made only in passing in one of Tchoukhrova's two asylum applications, see Admin. Rec. 201, and was not mentioned as a basis for a claim of persecution in Tchoukhrova's pre-hearing statement of facts submitted to the immigration judge, *id.* at 170-187, her testimony at the hearing, or her brief on appeal to the Board, *id.* at 21-38. She therefore did not exhaust her remedies on any such claim, as required by 8 U.S.C. 1252(d)(1). See Pet. App. 43a n.1 (Kozinski, J., dissenting from denial of rehearing en banc).

The court of appeals also relied on the two physical incidents described at pp. 7-8, *supra*. See Pet. App. 24a-25a. The court faulted the immigration judge for ignoring those incidents in his analysis of whether persecution had occurred, *id.* at 24a. (The immigration judge had referred to them in his findings of fact, see *id.* at 36a.) But instead of remanding to allow the Board or the immigration judge to determine in the first instance whether those incidents involving private individuals constituted persecution, the court relied on them itself in finding persecution.

[5] For example, the court concluded that Evgueni was subjected to persecution because he had "significantly circumscribed" medical care. Pet. App. 23a-24a. The immigration judge concluded, however, that "the testimony clearly showed that [Evgueni] did receive medical treatment," and observed that Tchoukhrova simply believed that her child was not being treated under normal standards of treatment given to children with cerebral palsy, *id.* at 35a; see, *e.g.*, Admin. Rec. 113 (Tr.

court then went on to hold both that the persecution i found and imputed to Evgueni's mother gave rise to presumption that Tchoukhrova has a well-founded fea of future persecution, Pet. App. 25a, and that the agenc could not rebut that presumption with evidence o changed circumstances or an ability to relocate in ternally, *id.* at 26a. In so holding, the court acknowl edged that those issues had not been addressed by th agency, noting that "the immigration judge did not ap ply the [well-founded fear] presumption" and "did no consider whether the INS met its rebuttal burden." *Id* at 25a. The court nevertheless considered it appropriate

---

46). The court of appeals did not point to any basis for concluding that the evidence compelled a contrary conclusion, see *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 & n.1 (1992); 8 U.S.C. 1252(b)(4)(B)—much less that the nature of the medical care made available by the government to Evgueni while he was in the custody of his parents and had access to private medical care constituted affirmative persecution by the government. The court similarly found persecution because, it asserted, Evgueni was denied the right to an elementary education, Pet. App. 23a-24a, but the government in fact afforded Evgueni home instruction, Admin. Rec. 333.

The court also concluded that Evgueni had been subjected to persecution because he was placed in an "*internaty*," over his parents' objection, during the first two months of his life. Pet App. 20a-23a. An internaty is an orphanage for "abandoned" orphans from 5 to 17 years old who have been diagnosed as "uneducable" because of severe mental impairment. Admin. Rec. 258, 267. As the dissenters from the denial of rehearing en banc explained (Pet. App. 48a n.2), Tchoukhrova testified and the immigration judge found that Evgueni was placed in a government hospital, not an internaty. See *id.* at 34a; Admin. Rec. 56, 95 (Tr. 28). And when Evgueni's parents were able to remove him from that facility, they placed him in a private hospital, Admin. Rec. 100 (Tr. 33), thereby recognizing that placement in a hospital was necessary.

BEST AVAILABLE COPY

to address and conclusively resolve those issues de novo. *Id.* at 25a-26a.

The court thus multiplied the *Thomas/Ventura* violation that occurred in this case. What is more, the failure to permit the agency to address the question of changed circumstances in the first instance was the *exact same* legal error that prompted summary reversal in *Ventura* itself, see 537 U.S. at 15-16. Here, as in *Ventura*, "remand could lead to the presentation of further evidence of current circumstances," *id.* at 18—concerning both (i) Evgueni's present condition and enhanced capabilities, now that he is 15 years old and has had the benefit of treatment in the United States, and (ii) how someone in his circumstances might fare in Russia today. The court of appeals had no authority to cut off the ability of the Board to inquire into those matters.

The court's only proffered reason for not remanding on the rebuttal issue was that the government had "made no argument to the agency—or to us—that there has been a fundamental change in circumstances or a possibility of relocation." Pet. App. 26a. But that is a manifestation of a "*Ventura* problem," not an excuse for ignoring *Ventura*. The government did not litigate the question of changed circumstances or internal relocation before the immigration judge or the Board because the immigration judge found that no persecution occurred, so there was nothing to rebut. And the government did not "argu[e]" the merits of those issues for the first time in the Ninth Circuit because that court had no authority to decide those questions in the first instance under this Court's clear teaching. See *Ventura*, *supra;* see also *Thomas*, *supra*. The government did argue that, if the court reversed the immigration judge's finding of no

persecution, the court should remand the remainin unaddressed issues to the Board. See Gov't C.A. Br. 28 30 (citing, *inter alia*, *Ventura*). But that was to no avail The Ninth Circuit instead brought its pattern of disre gard for "the ordinary remand rule," *Thomas*, 126 S. Ct at 1615, full circle, with the court asserting the govern ment's lack of complicity in a *Ventura* violation as the rationale for committing its *Ventura* violation.

3. The question of whether a parent is eligible for asylum and withholding of removal solely by imputation, and without establishing any past or future persecution of the parent in her own right, is of considerable significance in the administration of the immigration laws. The Ninth Circuit's judicially crafted rule of asylum eligibility ignores that derivative asylum claims fall within a narrow, statutorily delineated exception, 8 U.S.C. 1158(b)(3) (Supp. II 2002), to the general rule that persecution must be personal and individualized. Indeed, the court's rule flatly contradicts an agency regulation that specifically forbids the child-to-parent derivation of asylum. See 8 C.F.R. 207.7(b)(6). The court's new eligibility rule also runs roughshod over the longstanding statutory and regulatory declination to permit *any* form of derivative eligibility for withholding of removal. See Pet. App. 42a (dissent from denial of rehearing en banc) (stressing that the court's decision reached out to decide unilaterally "a question of exceptional importance with profound implications for our nation's immigration laws").

Beyond that, the court's rule was adopted without any consideration of the potential practical consequences of adopting a rule of derivative asylum and withholding eligibility that turns upon harm to children,

given that not every country or culture views children with the same solicitude and protective outlook as this Nation does. It is one thing to let adults who have personally endured persecution keep their otherwise helpless children with them; it is quite another thing to make the hardship of children the pathway to immigration relief for self-sufficient adults. Those types of "highly complex and sensitive" cultural assessments and acutely sensitive sociological and foreign policy judgments, *Ventura*, 537 U.S. at 17, are the province of the Executive Branch, not the courts. See *Aguirre-Aguirre*, 526 U.S. at 425 ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'") (quoting *INS* v. *Abudu*, 485 U.S. 94, 110 (1988)). Those considerations underscore why the court of appeals should have remanded to the Board to decide that question (along with any remaining issues in the case), rather than doing so itself in the first instance.

Moreover, the Ninth Circuit focused on the difficulty of dividing parents from their minor children when the child is the primary asylum applicant as a justification for adopting its rule of reverse derivative asylum, while ignoring other options already available to address such difficulties. Simply put, the interest in avoiding the division of families does not require granting asylum to all members of the family, including those who do not themselves suffer persecution. In practice, as this Court has noted, "the Executive has discretion" to abandon removal efforts or to stay execution of a removal order, and for years "ha[s] been engaging in a regular practice (which has come to be known as 'deferred ac-

tion') of exercising that discretion for humanitarian rea sons." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-484 (1999); see, *e.g.*, 8 C.F.R 241.6. The immigration judge himself suggested tha deferred action by the INS (now, the Secretary) woul be the proper means for addressing the humanitarian concerns raised by the situation of Evgueni and his family. Admin. Rec. 131 (Tr. 64). That approach can avoid dividing families without granting asylum or mandatory withholding of removal to parents who have not themselves suffered persecution. The weighing of the policy considerations implicated by alternative means of maintaining family units, while reserving asylum and withholding of removal for applicants who satisfy the criteria that Congress has specified, is a matter best left to the expert agency in the first instance. See *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 483-484.

4. In light of this Court's recent summary reversal of the Ninth Circuit in *Thomas* for committing the same failure-to-remand error, the Court should, at a minimum, grant the government's petition, vacate the judgment below, and remand for reconsideration in light of *Thomas*. In the government's view, however, the better course is to summarily reverse the decision of the Ninth Circuit in this case as well.

This panel has already had multiple opportunities to consider and reconsider whether it should have remanded this case rather than create new immigration law out of whole cloth. The government briefed the remand issue to the panel at some length. See Gov't C.A. Br. 28-30. The panel was fully aware of *Ventura*, citing it twice, albeit while giving it the back of its hand. Pet. App. 10a n.3, 26a. The government sought panel and en

banc rehearing based on the court's *Ventura* violation. See Gov't Reh'g Pet. 13-17. But the panel denied rehearing, Pet. App. 41a, notwithstanding the lengthy and vigorous dissent of seven members of the court on *Ventura* grounds. *Id.* at 42a-51a. There is no sound reason why the panel should be afforded yet another opportunity to do what this Court made clear in *Ventura* it should have done in the first place.

Accordingly, the decision of the Ninth Circuit so far departs from this Court's precedent and established principles of administrative law and deference on matters of immigration policy as to warrant this Court's review. Indeed, the court's error is just as obvious as it was in *Thomas*, so that summary reversal is appropriate.

CONCLUSION

The petition for a writ of certiorari should b granted and the judgment of the court of appeal summarily reversed. In the alternative, the petitio should be granted, the judgment of the court of appeal vacated, and the case remanded for further consider ation in light of *Gonzales* v. *Thomas*, 126 S. Ct. 161 (2006).

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PATRICIA A. MILLETT
Assistant to the Solicitor General
DONALD E. KEENER
MARGARET PERRY
Attorneys

MAY 2006

Supreme Court, U.S.
FILED
051401 MAY 4 - 2006
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

VICTORIA TCHOUKHROVA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor General

DONALD E. KEENER
MARGARET PERRY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

	Page
Appendix A (court of appeals opinion, filed Apr. 21, 2004)	1a
Appendix B (Board of Immigration Appeals decision, filed Feb. 25, 2003)	28a
Appendix C (Immigration Judge decision, filed Aug. 8, 2001)	30a
Appendix D (court of appeals order on rehearing, filed Dec. 5, 2005)	41a
Appendix E (statutory provisions)	52a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-71129
Agency Nos. A75-772-599, A75-772-600, A75-772-601

VICTORIA TCHOUKHROVA; DMITRI TCHOUKHROVA;
EVGUENI TCHOUKHROVA, PETITIONERS

v.

ALBERTO R. GONZALES*, ATTORNEY GENERAL,
RESPONDENT

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted
Sept. 1, 2004–Pasadena, California

Filed: Apr. 21, 2005

Before: STEPHEN REINHARDT, A. WALLACE TASHIMA, and KIM MCLANE WARDLAW, Circuit Judges.

Opinion by Judge REINHARDT.

---

* Alberto R. Gonzales is substituted for his predecessor, John Ashcroft, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

OPINION

REINHARDT, Circuit Judge:

The question before us is whether under our immigration laws asylum may be granted to the parents of a disabled child who has been persecuted in his native land on account of his disability or whether, instead, we are compelled to force the family to return involuntarily to its home country where the child is likely to face further persistent and debilitating persecution. To answer that question, we must decide (1) whether disabled children and their parents who provide care for them may constitute a particular social group within the meaning of our immigration laws and (2) whether, in order to protect a disabled child from persecution, a parent of such child may apply for asylum and withholding of removal and may rely during the administrative proceeding on the past persecutory conduct directed against the child.

We hold that disabled children and their parents constitute a statutorily protected group and that a parent who provides care for a disabled child may seek asylum and withholding of removal on the basis of the persecution the child has suffered on account of his disability. We also hold that, given the record before us, the parent who is seeking asylum and withholding in this case is eligible for the former relief and entitled to the latter. Finally, we hold that the parent's spouse and the disabled child are eligible for asylum by virtue of their derivative applications and are also entitled to withholding of removal.

I. FACTUAL AND PROCEDURAL HISTORY

Evgueni Tchoukhrova was born in 1991 in Vladivostok, Russia with infantile cerebral paralysis, or cerebral palsy. His disability resulted chiefly from the negligence of members of the staff of the Russian state-owned hospital, who first induced his mother's labor and then abandoned her for the entire night, during which time the fetus did not receive sufficient oxygen. The next morning, because the induced labor had stopped, hospital personnel decided to forcibly extract the child from its mother's body, breaking its neck in the process. Instead of giving the newborn child medical care, they initially threw Evgueni into a container holding abortion and other medical waste, telling his mother that "they didn't see the reason why he needed to live." The mother, Victoria Tchoukhrova, having lost a lot of blood, fell into a state of unconsciousness.

Against all odds and despite the staff's neglect, Evgueni survived, and was retrieved from the disposal bin. As soon as she became conscious again, Victoria commenced pleading to see her son, without success. She was told that he was severely disabled and that she should "refuse" him. After five days, Victoria managed to convince a nurse to break the rules and let her visit her child in the middle of the night because she "wanted desperately to see him and to hold his lifeless body close to [her] heart."

Despite Victoria and her husband Dmitri's attachment to their newborn son, government officials tried to intimidate the couple into abandoning him to a state-run orphanage. Notwithstanding his parents' refusal to give their consent, Evgueni was transferred to an institution for orphaned children with birth defects.

Victoria and Dmitri repeatedly sought to visit their son but were denied permission for the first two months.

When the Tchoukhrovas finally gained entrance to the "hospital" for children with birth defects, the conditions were horrifying. The children were wrapped in old, wet, dirty linens and cried out from hunger. No one cleaned or otherwise took care of them. Some children writhed in pain but received no treatment. Despite their cries and obvious plight, the "children were simply abandoned." The Tchoukhrovas would not allow their child to remain in confinement under such deplorable conditions and, notwithstanding intense pressure from state authorities to consent to Evgueni's permanent institutionalization, Victoria and Dmitri secured his release and put him in a private clinic.

Evgueni's parents' struggles had still not ended. Once Evgueni was diagnosed as having infantile cerebral palsy, he was permanently labeled as disabled and was consequently banned from receiving any public medical support for his condition. In search of better medical care for their child, the family traveled three times to the Osteopathic Center for Children in San Diego. As a result of the treatment that he received in the United States, Evgueni was able to walk for the first time in his life. When the family returned to Russia, Victoria and Dmitri, in accordance with the recommendation of his American doctor, refused to allow Evgueni to be vaccinated. The doctor was concerned about the boy's fragile immune system. Because Evgueni was not vaccinated, it became difficult for him to obtain *any* medical care in state-run medical facilities.

The diagnosis of cerebral palsy resulted in Evgueni's being denied access to public school, despite the fact

that his disability was a physical and not a mental one.[1] The Russian government doctor recommended that, if Evgueni's parents insisted on refusing to allow him to be institutionalized, he "be isolated at home" and not taken out into public places, a recommendation that was understandable given the extreme degree of societal prejudice against the disabled in Russia. When Victoria took Evgueni out in public, he was subjected to verbal abuse and spat upon. Victoria would often hear parents say to their children: "Get away from that boy, can't you see that he's abnormal" or "Don't get near him, he's sick." Children would throw things at him. Although many of the interactions were simply frightening and humiliating, two assaults resulted in Evgueni's hospitalization. On one visit to a park when he was six years old, several young men attacked him. The broken arm and severe head trauma that he suffered due to this incident required him to be hospitalized for two months and led to insomnia, spontaneous crying, shaking, and paranoia. Victoria and Dmitri filed a report with the police, but they never investigated the incident. On another occasion, a women yelled at Victoria, "Get your ugly imbecile out of here," and shoved Evgueni to the ground. He was rushed to the emergency room and received several stitches in his head, from which he still has a visible scar. Victoria again filed a police report; this time, the police told her the case was insignificant and to settle it herself. Evgueni became so frightened of the dangers he faced every time he went outside that

---

[1] In fact, Evgueni has been described by his current doctor as "an intelligent vital child who is determined to overcome his limitations." Since coming to the United States, Evgueni has learned English, has made friends, and is thriving at his elementary school where he is being educated in regular public school classes.

he refused to leave the house. All the while, the government continued to try to have him institutionalized.

Unable to get the government to treat their son with decency or even to attempt to protect him from the violent harassment he faced, Victoria and Dmitri decided to take political action in order to create a normal life for him. They joined together with other parents of disabled children and founded an association "that opposed the prevailing oppressive conditions of the handicap [sic] children," called "Mothers Unite!" Victoria worked to have a newspaper article published criticizing the Russian government's treatment of disabled children, but the proposed article was canceled at the last minute. The couple spoke to the authorities, wrote letters demanding equal rights, and engaged in fundraising on behalf of the cause. The family also sought help from the Moon Society; this action only provoked additional harassment. After one meeting, people threw stones at Victoria and vandalized the family's car. When Dmitri complained to the police, the authorities failed to respond. In 1997, Dmitri was fired from his job as a civil engineer and was unable to find employment for two years. In several job interviews, he was urged to stop advocating for the rights of the disabled. With hostilities toward the whole family increasing and the mounting certainty that Victoria and Dmitri would never be able adequately to protect their son and provide him with a life free from persecution, the family left for the United States in 2000.

Documentary evidence corroborates Victoria's testimony. The wretched treatment Evgueni received from both the Russian government and from private individuals in Russia is far from uncommon in that country. For example, the 2000 State Department Human

Rights Report ("State Department Report") confirms that Evgueni's treatment as a child with cerebral palsy reflects the standard practice. Russia institutionalizes its "orphans," more than 90% of whom are so-called "social orphans"—children who have at least one living parent but who, like Evgueni, are so-classified by the state because they have been deemed undesirable in some respect. The State Department Report states:

> [T]he prospects of children/orphans who are disabled physically or mentally are extremely bleak. The label of "imbecile" or idiot, which signifies "uneducable," is almost always irrevokable. The most likely future is a lifetime in state institutions.

The Report also explains that, once institutionalized, children are often "provided for poorly" and are in some cases "abused physically by staff." The State Department Report also incorporates the 1998 Human Rights Watch Report "Abandoned to the State," which chronicles the "shocking levels of cruelty and neglect" in the state institutions, called "*internaty*," where children with cerebral palsy and other disabilities are "warehoused":

> In addition to receiving little or no education in such internaty, these orphans may be restrained in cloth sacks, tethered by a limb to furniture, denied stimulation, and sometimes left to die half-naked in their own filth. Bedridden children aged five to seventeen are confined to understaffed lying-down rooms . . . and in some cases are neglected to the point of death.

According to the Human Rights Watch Report, "severely disabled babies are routinely abandoned at state-run maternity wards, under pressure from medi-

cal personnel who warn the recuperating mothers of a life as social pariahs if they keep a 'defective' child." All children who have been institutionalized face the danger of being diagnosed as "'*oligophrenic*,' or mentally retarded" even when they have no mental impairments. As explained in the report, those with "diagnoses of *oligophrenia* have extreme difficulty seeking a reassessment of their status," and "[t]hose who grow to adulthood are then interned in another 'total institution,' where they are permanently denied opportunities to know and enjoy their civil and political rights." Even the children who manage to be classified as "normal" while institutionalized face grim prospects because they "lack the necessary social, educational, and vocational skills to function in society."

Unfortunately, what is true for social orphans in Russia extends to disabled people generally in that country. As the State Department Report explains, the disabled face the danger of being "removed from mainstream society and isolated in state institution[s]"; they face "immense problems" created by the government and societal prejudice.

The Tchoukhrovas entered the United States on September 9, 2000 and shortly thereafter applied for asylum, withholding, and relief under the Convention Against Torture. Victoria filed the principal application for asylum and listed both Dmitri and Evgueni; she stated that she wished to include them in her application. In an oral decision, the immigration judge made explicit findings that (1) Victoria's testimony was credible, (2) the family were members of a particular social group, namely, "a family whose child is severely disabled," (3) the harms suffered by the Tchoukhrovas were on account of their membership in that particular

social group, (4) the government of Russia was responsible for the harms because "the government of Russia wishes to isolate handicapped children," (5) "Russian society does not tolerate people with disabilities," and (6) the family did suffer harm in Russia. However, while saying the case was close and that he hoped that the family would be able to stay in the United States, the immigration judge held that the harms the family suffered did not rise to the level of persecution. He therefore denied Victoria's application for asylum, withholding, and a prohibition against removal under the Convention Against Torture.[2] The BIA issued a summary, although not streamlined, decision in which it noted that the Tchoukhrovas had a "very sympathetic family history," but, nevertheless, adopted the immigration judge's decision and denied the relief sought. This petition for review followed.

II. STANDARD OF REVIEW

We accept the petitioner's testimony as true when, as here, the agency finds her to be credible. *Mihalev* v. *Ashcroft*, 388 F.3d 722, 724 (9th Cir. 2004). To establish eligibility for asylum, the petitioner must prove that she is unable or unwilling to return to her home country because of a well-founded fear of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion. . . ." 8 U.S.C. § 1101(a)(42)(A); *see INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 (1987). An asylum applicant can establish eligibility either "because he or she has suffered

---

[2] The Tchoukhrovas have since abandoned their Convention Against Torture claim. Furthermore, although the family requested voluntary departure at their hearing and although the immigration judge never ruled on that request, the Tchoukhrovas do not appeal that issue.

past persecution or because he or she has a well-founded fear of future persecution." 8 C.F.R. §1208.13(b) (2005). The applicant is entitled to withholding if she has suffered a past threat to life or freedom or is more likely than not to endure a future threat to life or freedom. 8 C.F.R. § 1206.16(b) (2005).

When the BIA adopts the immigration judge's decision as its own, we treat the immigration judge's reasons as the BIA's. *He* v. *Ashcroft*, 328 F.3d 593, 595-96 (9th Cir. 2003). Here, the BIA relied on *Matter of Burbano*, 20 I. & N. Dec. 872, 874 (BIA 1994), which holds that "the Board's final decision may be rendered in a summary fashion," and that, in such cases "the Board's conclusions upon review of the record coincide with those which the immigration judge articulated in his or her decision." When the BIA does not express any disagreement with any part of the immigration judge's decision, but instead cites *Burbano*, the BIA adopts his decision in its entirety.

III. ANALYSIS

Because the immigration judge explicitly reached all of the component issues in the family's asylum and withholding claims, we review each of those determinations here, and, if relief is warranted, we are authorized to order that such remedy or remedies be granted.[3]

---

[3] Contrary to the government's argument, *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam) does not require us to remand cases to the BIA when an immigration judge has decided an issue of first impression and the BIA issues a *Burbano* affirmance adopting the IJ's opinion in a summary fashion, as the BIA has, by virtue of the *Burbano* affirmance, already ruled on the issue in question. We note that a *Burbano* affirmance is different from a streamlined affirmance which signifies only "that the result reached in the decision under review was correct; that any errors in the deci-

We agree with the legal conclusion of the immigration judge and the BIA that disabled children and their parents who provide care for them are members of "a particular social group." We also agree that the factual findings that Evgueni and his parents were members of that social group, were harmed (directly or indirectly) on account of their membership, and that these harms were inflicted by the Russian government or those whom it was unwilling or unable to control are supported by substantial evidence. Furthermore, although we agree that, as a matter of law, the immigration judge was correct to look at the harms faced by the Tchoukhrovas collectively when evaluating Victoria's application, we hold that his determination that the harms did not rise to the level of persecution is not supported by substantial evidence.

A. On Account Of A Particular Social Group

The first question we must consider is whether disabled children and their parents who provide care for them constitute a particular social group within the meaning of 8 U.S.C. § 1101(a)(42)(A). Whether a category constitutes "a particular social group" for the purposes of asylum and withholding of removal is a legal question we review de novo. *Hernandez-Montiel* v. *INS*, 225 F.3d 1084, 1091 (9th Cir. 2000). A "particular social group" is one in which the members are "united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be re-

---

sion under review were harmless or nonmaterial." 8 C.F.R. § 1003.1(a)(7)(ii); *Chen* v. *Ashcroft*, 378 F.3d 1081, 1087 n.2 (9th Cir. 2004).

quired to change it." *Id.* at 1093. We agree with the agency that Russian disabled children and their parents constitute a "particular social group."

We begin by noting that persons with disabilities are precisely the kind of individuals that our asylum law contemplates by the words "members of a particular social group." While not all disabilities are "innate" or "inherent," in the sense that they may be acquired, they are usually, unfortunately, "immutable." *Id.* at 1087, 1093; *see also* Americans with Disabilities Act of 1990, Pub. L. No. 101 336 § 2(a)(7) *codified* at 42 U.S.C. § 12101(a)(7) ("[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness . . . based on characteristics that are beyond the control of such individuals . . . ."). Because disability constitutes precisely the sort of "immutable characteristic" that an individual "cannot change," as contemplated by our law, we have no trouble concluding that persons with disabilities can constitute a "particular social group" for purposes of asylum and withholding of removal law.

As the above analysis suggests, we include within the social group only persons whose disabilities are serious and long-lasting or permanent in nature. We need not decide whether such persons necessarily constitute a social group in every country, although it is clear from our references to the Americans with Disabilities Act that in this land they do. For purposes of this case, we need determine only two narrow questions. First, do disabled children in Russia constitute a particular social group? And, second, may their parents be joined with

them in that classification? We answer both questions affirmatively.

Disabled children in Russia constitute a distinct and identifiable group. In this respect, disabled Russian children resemble the particular social groups our circuit has previously recognized. *See, e.g., Mohamed* v. *Gonzales*, 400 F.3d 785, 796-98 (9th Cir. 2005) (holding that a Somali woman under threat of female genital mutilation was a member of a particular social group); *Karouni* v. *Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005)(holding that "*all* alien homosexuals are members of a 'particular social group'"). Disabled children in Russia share not only common characteristics but a common experience as well. Their mistreatment by the state and society in general is well-documented before us, by explicit discussion in both the State Department Report and a Human Rights Watch Report devoted to the issue. Russian children who are disabled experience permanent and stigmatizing labeling, lifetime institutional *internaty*, denial of education and medical care, and constant, serious, and often violent harassment. All of this evidence supports our conclusion that in Russia disabled children constitute a particular social group.

We further hold that Russian parents who provide care for their disabled children are properly included in the particular social group. Parents who resist the harms inflicted by the Russian government upon their children often express a political opinion while doing so, and thus may be entitled to asylum on that basis as

well."[4] But, in providing care for their disabled children, parents are doing something more fundamental than engaging in politics: They are acting out of love and devotion for their children. Helping care for one's disabled child is an act basic to one's humanity. Parents who provide such care act in a manner that is "so fundamental" to their identities that they "should not be required to change." *Hernandez-Montiel*, 225 F.3d at 1093; *see also Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). Likewise, just as their children's disabilities are "immutable," so is a parent's relationship to a disabled child. Because the parents and their disabled child incur the harm as a unit, it is appropriate to combine family members into a single social group for purposes of asylum and withholding. Furthermore, including parents in the social group with their disabled children is consistent with the definition of a "particular social group" that we sometimes employ, namely, "a collection of people closely affiliated with each other, who are actuated by some common impulse or interest." *Sanchez-Trujillo* v. *INS*, 801 F.2d 1511, 1576 (9th Cir. 1986). The family interest in preserving the rights and protecting the welfare of a disabled child welds the parents (or those in loco parentis) together with the disabled child in a manner that qualifies all of them as members of a social group for purposes of our immigration laws.

We therefore come to the same legal conclusion as the agency and hold that Russian disabled children and

---

[4] Indeed, Victoria and Dmitri pursued political means to redress their son's mistreatment—forming a political group, raising funds, meeting with political leaders, and writing letters.

their parents who help care for them constitute a social group for purposes of our immigration statutes. See 8 U.S.C. §1101(a)(42)(A). If individuals experience persecution on account of their membership in that group, they may seek asylum and withholding of removal.

In addition to the legal questions, we also consider the immigration judge's factual determinations that (1) the Tchoukhrovas were members of this particular social group, (2) the harms that they experienced were on account of their membership in the social group, and (3) the harms that occurred were inflicted by the government or those whom the government was unwilling or unable to control. In this case, none of these factual determinations is disputed. Uncontroverted evidence supports the findings that Evgueni suffers from cerebral palsy and is classified as disabled by the Russian government, that Victoria and Dmitri have dedicated their lives to caring for their son, and that the Tchoukhrova family was therefore part of the "social group" of disabled Russian children and their parents. Furthermore, it is undisputed that the government's cruel mistreatment of Evgueni and the violence to which he was subjected by private parties were both on account of his membership in that group and that the government not only inflicted harm directly but was unwilling or unable to control the persecutory conduct of the private parties involved. Accordingly, the requirements for finding "persecution" under the statute are all met, except for the question whether the harmful and injurious conduct to which Evgueni was subjected rose to the level of persecution.

B. Rising To The Level Of Persecution

1. Preliminary Question

Before addressing the final issue, we must decide a threshold procedural question: May the harms suffered by a disabled child be taken into account when determining whether to grant his parent's asylum application? Once again, we agree with the approach taken by the agency in this case. Without discussing the question expressly, the agency treated the harms inflicted on the family members cumulatively. Both the purposes of our immigration statutes and the background principles of law generally applicable to families and children mandate the procedure followed by the agency in this case.

Immigration law has always had a purpose of protecting families and, where possible, keeping them united. *See, e.g., Solis-Espinoza* v. *Gonzales*, ___ F.3d ___ (9th Cir. 2005) ("The Immigration and Nationality Act ("INA") was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members."). It has also always been a principle of American law that the family is a unique and important social unit entitled to legal protection. *See Moore* v. *City of East Cleveland*, 431 U.S. 494, 503 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."); *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972) (emphasizing the "important" and "essential" nature of the family and holding that "integrity of the family unit" is constitutionally protected); *see also Troxel* v. *Granville*, 530 U.S. 57, 65 (2000) (rejecting any notion that a "child is the mere creature of the State") (inter-

nal citations omitted). Caring for the family is also consistent with our international obligations. *See, e.g.*, International Covenant on Civil and Political Rights, art. 23, opened for signature, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, 375 (ratified by the United States on September 5, 1992) ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."). Imputing the disabled child's harms to the parent filing an application for asylum on behalf of the family members vindicates these basic principles and statutory purposes, and renders the law consonant with both common sense and the important family values on which this nation prides itself. The agency was correct, as a matter of law, to do so here.

The procedural issue arises as a consequence of the limited scope of derivative asylum applications. Under 8 U.S.C. § 1158(b)(3), only a spouse or child of an alien may obtain asylum eligibility derivatively when the petitioning alien's application is approved. Although the statute provides that minor children may obtain asylum derivatively through their parents, there is no comparable provision permitting parents to obtain that relief derivatively through their minor children. Accordingly, if a minor child is granted asylum as a derivative applicant of his parent's principal application, both parents and child can stay in the United States. However, if the child is the principal applicant and is granted asylum, the child can legally stay in this country, but his parents will be removed. This second circumstance occurs rarely because parents fleeing to this country usually have their own claims of persecution, and it is infrequent that the child is the only member of the family who has been directly persecuted in the

family's native country. *See generally* Jeff Weiss, U.S. Dep't. of Justice, Guidelines for Children's Asylum Claims, *at* 1998 WL 34032561 (1998) ("The majority of children who apply for asylum do so riding along with a parent's ('principal') application."). However, when it is only the child who is the direct victim, a narrow interpretation of our asylum laws could have devastating practical effects: Facing imminent removal, parents could be forced to make a choice between abandoning their child in the United States or taking him to a country where it is likely that he will be persecuted.

In the case of disabled children, this dilemma is exacerbated. Although all children are dependent and vulnerable, disabled children are particularly so. Children with disabilities have unique needs, their treatment frequently requires specialized knowledge, and their care often involves heightened levels of compassion and patience that parents are particularly suited, and motivated, to give. *See Parham* v. *J. R.*, 442 U.S. 584, 618 (1979) ("For a ward of the state, there may well be no adult who knows him thoroughly and who cares for him deeply[,] [u]nlike with natural parents where there is a presumed natural affection to guide their action. . . ."). Furthermore, because children with disabilities still face considerable discrimination, even in a country such as our own, they require more protection than children who are not confronted with such prejudices. Therefore, if we were to interpret the law as requiring persecuted disabled children to apply for asylum on their own as principal applicants, while barring their parents from applying for asylum on their behalf or on the basis of the persecution that the children have experienced or fear, the consequences would be particularly disastrous. Disabled children would be

able to live either in a country free from persecution or with a care-giving parent, but not both. This interpretation would result in affording relief to persecuted disabled children in name only. Fortunately, our law is not so cruel as to require that result.

Our precedent supports the pragmatic approach applied here by the agency. When confronting cases involving persecution of multiple family members, we have not formalistically divided the claims between "principal" and "derivative" applicants but instead, without discussion, have simply viewed the family as a whole. *See, e.g.*, *Kaiser* v. *Ashcroft*, 390 F.3d 653, 660 (9th Cir. 2004) ("Because Kaiser and his family have a well-founded fear of persecution in Pakistan . . . we grant the petition with respect to Petitioners' asylum claim and remand to the BIA."); *Maini* v. *INS*, 212 F.3d 1167, 1177 (9th Cir. 2000) ("Accordingly, we hold that the Maims are 'statutorily eligible for asylum.'"); *Singh* v. *INS*, 94 F.3d 1353, 1360 (9th Cir. 1996) ("[W]e conclude that Singh and his family are eligible for asylum based on the past persecution they suffered in Fiji."); *Prasad* v. *INS*, 47 F.3d 336, 339 (9th Cir. 1995) (discussing the "family's application"). Following that practice here, we hold that a parent of a disabled child may file as a principal applicant in order to prevent the child's forced return to the family's home country and may establish her asylum claim on the basis of the persecution inflicted on or feared by the child.

2. Extent Of Past Harm

Although we have agreed with the agency's adjudication of this case thus far, we conclude that it erred in finding that the injurious conduct to which Evgueni and his parents were subjected did not rise to the level of persecution. Substantial evidence does not support

that finding. To the contrary, the record compels the conclusion that the harm suffered by the Tchoukhrovas constituted persecution within the meaning of 8 U.S.C. § 1101(a)(42).

Throughout Evgueni's life, he has suffered greatly at the hands of others. Below, we explain the four kinds of injurious conduct to which he has been subjected. Although most of these harms could rise to the level of persecution independently, there is no doubt that, when taken together, they constitute persecution. *Guo* v. *Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004) (explaining how the court "look[s] at the totality of the circumstances in deciding whether a finding of persecution is compelled").

The first form of injury inflicted on Evgueni occurred in the hospital at the time of his birth. Although the breaking of his neck was likely a result of gross negligence, the subsequent attempted disposal of the newborn child as medical waste because he was "damaged" was unquestionably intentional. The immigration judge failed to discuss this incident when deciding that the treatment to which Evgueni was subjected did not constitute persecution. Although there are no precedents on point—most likely because few living individuals have been discarded along with aborted fetuses and survived—we have no doubt that being treated as waste and thrown into a pile of human remains, when done on account of a protected ground, rises to the level of persecution.

The second form of injury Evgueni suffered was his involuntary confinement in an "*internaty*." Aside from any pain or suffering associated with the conditions of the confinement, children, like adults, have a right to be free. The deprivation of freedom can constitute perse-

cution and can form the basis of eligibility for asylum or entitlement to withholding. *See, e.g.*, 8 C.F.R. § 1208.13; 8 C.F.R. § 1208.16 (an alien may be entitled to withholding of removal when his "life or freedom" would be threatened on account of a protected ground). It is true that "we have held that some circumstances that cause petitioners physical discomfort or loss of liberty do not qualify as persecution." *Mihalev*, 388 F.3d at 729. Here, however, Evgueni was confined against his parents' will for two months as a child. He was not a danger to society. Nor was it necessary that the state provide care for him. (Indeed, the state gave him virtually no care during his institutionalization.) Evgueni deserved to be free. *See Parham*, 442 U.S. at 600 (holding that disabled children have "a substantial liberty interest in not being confined unnecessarily").

The fact of Evgueni's unnecessary, involuntary, and unjustified confinement might alone be sufficient to warrant a finding of persecution. Given the horrifying conditions of his confinement, however, any reasonable factfinder would be compelled to conclude that in his case the confinement rose to that level. At Evgueni's "*internaty*," the children were wrapped in wet, soiled linens and abandoned in cold rooms to spend their days alone without human contact, much less affection. No one cleaned them and they were rarely and inadequately fed. They did not receive medical treatment, even those who were in great pain from the injuries they suffered. Their frequent screams elicited no response from the institution's staff. Evgueni spent his first two months of life in these shameful conditions and is lucky to have survived.

Under our precedent, involuntary detentions under harsh conditions can constitute persecution. See *Ndom*

v. *Ashcroft*, 384 F.3d 743, 752 (9th Cir. 2004) (holding that two detentions, for a total of 25 days, in "dark, crowded cells without formal charges," "shackled in cuffs that prevented him from straightening his legs," and "forced to urinate in his clothes" along with threats constituted persecution); *Kalubi* v. *Ashcroft*, 364 F.3d 1134, 1136 (9th Cir. 2004) (noting that immigration judge found that imprisonment in a "over-crowded jail cell with harsh, unsanitary and lifethreatening conditions" established persecution). That Evgueni was subjected to such harsh conditions at a tender age strengthens his claim. The time he spent suffering, without any stimulus or love, were two developmentally crucial months of his life. See *Parham*, 442 U.S at 627-28 (Brennan, J. concurring in part and dissenting in part) (explaining how institutional confinement has more severe consequences on children than adults and that "childhood is a particularly vulnerable time of life and children erroneously institutionalized during their formative years may bear the scars for the rest of their lives"). Furthermore, the fact that Evgueni's treatment was standard practice for the Russian government and not directed at him personally does not lessen the nature of the harm he experienced. In fact, "the more serious and widespread the threat of persecution to the group," the easier it is for an applicant to prove a well-founded fear of persecution. *Mgoian* v. *INS*, 184 F.3d 1029, 1035 n.4 (9th Cir. 1999). Finally, while we do not assume that the Russian government had Evgueni's best interests at heart when it institutionalized him—indeed, the evidence supports the opposite conclusion—the lack of malicious intent on the part of the persecutor is irrelevant to this aspect of our inquiry. *See, e.g.*, *Pitcherskaia* v. *INS*, 118 F.3d 641, 648 (9th Cir. 1997) ("The fact that a persecutor believes the

harm he is inflicting is 'good for' his victim does not make it any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution . . . . Human rights laws cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as 'curing' or 'treating' the victims."); *In re Kasinga*, 21 1. & N. Dec. 357, 365 (BIA 1996) (holding that "'punitive' or 'malignant' intent is not required for harm to constitute persecution"). Thus, Evgueni's confinement under the conditions that existed in his *internaty* constituted significant persecutory conduct.

The third form of harm Evgueni suffered was continuing discrimination by the Russian government following his release from confinement. Because he was officially labeled as disabled by the Russian government, Evgueni was denied rights afforded to all other citizens. One right that was significantly circumscribed was access to medical care. Specifically, Evgueni was never given any treatment for his cerebral pa[illegible] and had difficulty obtaining routine medical care afforded to other Russians as a matter of course. He was also denied the benefits of another right—the right to an elementary education. While Evgueni is an intelligent and thriving young boy, the disability label the government attached to him served to bar him from attending public schools. The immigration judge excused the Russian government's treatment of Evgueni because Russia "does not have the resources to provide medical attention to individuals at the same standards as in developed nations." He applied the same reasoning to the state's refusal to provide Evgueni with an elementary or other education. However, that reasoning was erroneous.

It is true generally that a country's failure to provide its citizens with a particular level of medical care or education due to economic constraints is not persecution. *See Raffington* v. *INS*, 340 F.3d 720, 723 (8th Cir. 2003). However, claims of financial difficulties cannot be used to justify the deprivation of services essential to human survival and development, if the deprivation is based on the recipient's membership in a statutorily protected group. The government's refusal to provide medical care and an elementary education to "disabled children" solely because they are members of the particular social group the term describes cannot be excused on the basis of the need to limit expenditures. If medical or education resources are to be limited, the allocation of funds must be based on other, less invidious, grounds. Although denying medical care or education on the basis of race, ethnicity, religion, political opinion, or membership in a particular social group is, at a minimum, discrimination, where the denial seriously jeopardizes the health or welfare of the affected individuals, a finding of persecution is warranted.

Furthermore, Evgueni remains under constant threat that he will be returned to an *internaty* by the Russian government, as Russia confines both disabled children and adults in "total institutions." In these institutions, the inmates are denied all their civil and political rights and kept in inhumane circumstances. While Evgueni's parents have been successful so far in preventing the government from re-institutionalizing him, if the government were to prevail in its efforts, Evgueni would be subjected to a lifetime of suffering. The continuing threat of that confinement, when considered along with the continuing denial of a public education and of medical care for the condition that

plagues Evgueni, provides strong support for the claim of persecution.

The fourth form of harm from which Evgueni suffered is violence on the part of individual citizens. When considering whether the adverse treatment to which Evgueni was subjected rose to the level of persecution, the immigration judge failed even to mention this factor, and completely ignored the two assaults on Evgueni that caused him serious bodily injury. In doing so, the immigration judge committed error. The two incidents were serious indeed; in both instances Evgueni required medical attention and as a result of one of them he was hospitalized for a two month period. *See, e.g., Chand* v. *INS*, 222 F.3d 1066, 1073-74 (9th Cir. 2000) ("Physical harm has consistently been treated as persecution."); *Durate de Guinac* v. *INS*, 179 F.3d 1156, 1161 (9th Cir. 1999) ("[W]e have consistently found persecution where, as here, the petitioner was physically harmed. . . ."). The Tchoukhrovas reported these and other incidents to the authorities, who refused even to investigate them. As the Russian government was "unwilling or unable" to control the conduct of those who assault the disabled, the Tchoukhrovas are entitled to seek asylum and wihthholding of removal on that basis. *Malty* v. *Ashcroft*, 381 F.3d 942, 948 (9th Cir. 2004); *see also Avetova-Elisseva* v. *INS*, 213 F.3d 1192, 1198 (9th Cir. 2000) (holding that the fact that "financial considerations may account for" Russia's inability to prevent persecution "does not matter").

Taken as a whole, the harm to which Evgueni was subjected unquestionably rose to the level of persecution. Because this persecution is properly considered when adjudicating his mother's claim, we hold that Victoria has suffered past persecution, and note that

the same would be true whichever parent was the principal applicant.

3. Well-Founded Fear

Because Victoria suffered past persecution, she is entitled to a presumption. 8 C.F.R. § 1208.13(b)(1). Here the immigration judge did not apply the presumption and therefore did not consider whether the INS met its rebuttal burden. In such cases, we often remand for the agency to resolve, in the first instance, the question of a "fundamental change in circumstances" or that there is the possibility of relocation—the two ways the INS could demonstrate that the Tchoukhrovas no longer have a well-founded fear—in the first instance. *See Ventura*, 537 U.S. at 14, 17-18; *Lopez* v. *Ashcroft*, 366 F.3d 799, 806-07 (9th Cir. 2004). However, when the INS makes no argument before the immigration judge or the BIA concerning changed conditions, we do not remand. *See Ndom*, 384 F.3d at 756; *Baballah* v. *Ashcroft*, 367 F.3d 1067, 1078 n.11 (9th Cir. 2004). Here, the INS made no argument to the agency—or to us—that there has been a fundamental change in circumstances or a possibility of relocation. Moreover, no evidence regarding improvement in the conditions facing the disabled in Russia appears in the record. To the contrary, the record clearly shows that Russia continues to treat its disabled population, and particularly its disabled children, cruelly and inhumanely. Under these circumstances, the presumption has not been, and cannot be, rebutted. Thus, Victoria has established a well founded fear of persecution. Accordingly, she is statutorily eligible for asylum, and we remand for the Attorney General to exercise his discretion. If Victoria is granted asylum, Dmitri and Evgueni may obtain relief through their derivative applications.

Because it is more likely than not that Evgueni would face persecution if he were returned to Russia, Victoria is also entitled to withholding of removal, 8 C.F.R. §1208.16(b)(1), as are Dmitri and Evgueni. The agency erred in failing to grant this relief. *See, e.g., Qu* v. *Gonzales*, 399 F.3d 1195, 1203 (9th Cir. 2005); *Agbuya* v. *INS*, 241 F.3d 1224, 1231 (9th Cir. 2001) (as amended). Accordingly, we also remand for the grant of withholding of removal.

GRANTED and **REMANDED** for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

Files: A75-772-599-San Diego
A75-772-600, A75-772-601

IN RE: VICTORIA TCHOUKHROVA; DMITRI TCHOUKHROV; EVGUENI TCHOUKHROV

[Filed: Feb. 25, 2003]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Tatyana A. Edwards, Esquire

ON BEHALF OF SERVICE:
Michael K. Adams
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)]—In the United States in violation of law (all respondents)

APPLICATION: Asylum; withholding of removal; relief pursuant to the Convention Against Torture

ORDER:

PER CURIAM: In a decision dated August 8, 2001, the Immigration Judge found the respondents removable as charged, denied the adult female (lead) respondent's request for asylum, withholding of removal, and relief pursuant to the Convention Against Torture[1], and ordered the respondent's removed from the United States to Russia. The respondents appealed this decision. The appeal is dismissed. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). While the respondents present a very sympathetic family history, we are not persuaded that the Immigration Judge's decision was in error in finding that the lead respondent has not adequately demonstrated that she was a victim of past persecution on account of political opinion or membership in a particular social group or that she has a well-founded fear or faces a clear probability of such persecution in her country of nationality. Accordingly, we affirm the decision of the Immigration Judge.

/s/ [ILLEGIBLE]
NEIL P. MILLER
FOR THE BOARD

---

[1] *See* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A.res. 39/46 (annex, 39 U.N. GAOR Supp. (No. 51) at 197), U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988). The respondents did not contest on appeal the Immigration Judge's ruling regarding protection under the Convention Against Torture.

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Diego, California

Files: A75-772-599-San Diego
A75-772-600, A75-772-601

IN RE: VICTORIA TCHOUKHROVA; DMITRI TCHOUKHROV; EVGUENI TCHOUKHROV, RESPONDENTS

[Filed: Aug. 8, 2001]

IN REMOVAL PROCEEDINGS

CHARGE:

Section 237(a)(1)(B) of the Immigration and Nationality Act, a non-immigrant who remained in the United States longer than authorized

APPLICATIONS:

Section 208 of the Act, asylum; Section 241(b)(3) of the Act, withholding of removal; relief under the Convention Against Torture

ON BEHALF OF RESPONDENT:

Tatyana Ewards, Esquire
7748 Herschel Avenue
La Jolla, CA 92037

BEHALF OF SERVICE:

Michael K. Adams, Esquire
Assistant District Counsel
Immigration and Nationalization Service
San Diego District

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent, Victoria Tchoukhrova, is a 30-year-old female, native and citizen of Russia who is charged with being removable as noted above. Respondent, Dimitri Tchoukhrova is a 30-year-old male, native and citizen of Russia who is charged with being removable as noted above. Respondnet, Evgueni Tchoukhrova, is a 14-year-old native and citizen of Russia who is charged with being removable as noted above.

The Service alleges that all three respondents were admitted to the United States on September 9th, 2000, as non-immigrant visitors with authorization to remain in the United States until March 8th, 2001. The Service further alleges that all three respondents remained in the United States beyond March 8th, 2001, without authorization from the Immigration and Naturalization Service.

Respondents admitted the truthfulness of the factual allegations contained in their individual Notice[s] to Appear and conceded that they are removable under the charge stated therein. Based upon these admissions, I find that all three respondents are removable as charged.

The respondents declined to designate a country for removal purposes, and this Court designated Russia should such action become necessary. As relief from removal, the respondent, Victoria Tchoukhrova, has applied for asylum pursuant to Section 208 of the Act, which is also considered an application for withholding of removal pursuant to Section 241(b)(3) of the Act. The respondent has also applied for relief under the Convention Against Torture.

This application includes the other named respon dents herein. A spouse or a child of an alien who is granted asylum may, if otherwise eligible for asylum, be granted the status as the principal alien. Since the adult female respondent has filed the asylum applica tion and the remaining respondents are dependent upon that application, this decision will primarily discuss the adult female with reference to other family members as appropriate.

To be eligible for asylum, an alien must demonstrate that he is a "refugee" within the meaning of Section 101(a)(42)(A) of the Act. A refugee is defined as any person who is unable or unwilling to return to his or her home country because of persecution or a well-founded fear or persecution on account of race, religion, nation ality membership in a particular social group, or politi cal opinion. An applicant for asylum has established a well-founded fear of persecution if it is shown that a reasonable person in his circumstances would fear persecution. *Matter of Mogharrabi*, 19 I & N Dec. 438 (BIA 1987). Furthermore, asylum, unlike withholding of removal, may be denied in the exercise of discretion to an alien who establishes statutory eligibility. *INS v Cardoza-Fonseca*, 480 U.S. 421 (1987).

To establish eligibility for withholding of removal, an alien must demonstrate a clear probability of perse cution in the country designated for removal on the same grounds as stated in the asylum statute. *INS v Stevic*, 467 U.S. 407 (1984). This means, that the alien must establish that it is more likely than not that he would be subject to persecution on one of the grounds specified in the Act.

In order to receive withholding of removal or defer ral of removal under the Convention Against Torture

the respondent must prove that it is more likely than not that he would be subject to torture if he is returned to the proposed country of removal. 8 C.F.R. 208.16(c)(2).

The record consists of the following documents: two asylum applications, an affidavit of the lead respondent, several documents concerning the medical condition of the respondent's son, Evgueni, and numerous documents concerning country conditions in Russia.

Before I proceed with an analysis of the facts of this case, I must comment on the credibility of the lead respondent. I have carefully observed the respondent's testimony and demeanor while on the witness stand. I find the respondent's testimony to be plausible, internally consistent, sufficiently detailed, and responsive to questions. I also find that the respondent, in certain portions of her testimony, may have exaggerated facts. The respondent had a tendency to state broad opinions concerning possible past persecution. When the respondent was questioned in further detail, it is clear that those broad opinions were not supported by fact.

This Court also is aware that the respondent's first asylum application did not contain all of the alleged incidents of past persecution. I find that the respondent explained adequately why she did not place all of the alleged past persecution incidents in her initial asylum application. On the whole, I find the respondent was a credible witness.

The respondents are claiming asylum based on past persecution and a well-founded fear of future persecution on account of their political opinion and also on account of the fact that the respondents claim to be

members of a particular social group singled-out fo persecution in Russia.

The lead respondent indicated that she believes sh suffered past persecution and will suffer future per secution due to her political opinion. The lead respon dent expressed her political opinion to other parents o handicapped children. She also attempted to writ newspaper articles concerning the government's treat ment of handicapped children. Her political opinion i that she is against the government's treatment o handicapped individuals.

The respondents are also claiming that they ar members of a particular social group singled-out fo persecution in Russia. They claim to be a family with child who has a debilitating disability known as cerebra palsy. They further claim that their child is a membe of a particular social group. They claim that the child i a disabled child in Russia. The respondents claim tha the family has been persecuted and will suffer futur persecution due to the fact that they are a family whos child is severely disabled.

FINDINGS OF FACT

I find that the respondent's child was born witl infantile cerebral paralysis, also known as cerebra palsy. I further find that the respondent's child wa separated from [his] parents for a period of five day while in the hospital. The child was then transferred t another hospital and deprived of his parents for period of two months. I further find that the lea respondent complained to the ministry of health o many occasions to be allowed to see her child.

The Court further finds that the conditions in th hospital in which the respondent's child was confine

were deplorable. The children were wrapped in old and dirty linen. They were wet and dirty, and no one cleaned them. They were not properly fed. One child had a severe spinal hernia and was crying in pain.

I further find that the respondent believed that the ministry of health was attempting to have her abandon her son. She was informed by members of the ministry of health that she should abandon her son so that he could be placed in a facility for handicapped children. I find that the respondent has a basis for believing that the government in Russia wishes to isolate handicapped children.

When the respondent was approximately one year old, he was diagnosed with the disease known as infantile cerebral paralysis. The respondent indicated that said diagnosis resulted in many disabilities to the respondent. The respondent testified that her child would not be admitted to public school because of his disease. The respondent also indicated that her child suffered harm when in public places because many citizens of Russia are not accustomed to seeing handicapped children.

Although the respondent testified that her child was refused medical treatment and support, the testimony clearly showed that her child did receive medical treatment. The respondent did not agree with the medical treatment given to her child. The respondent believed that her child was not being treated under the normal standards of treatment given to children with cerebral palsy.

The respondent also testified to two incidents of harm suffered by her child. The respondent testified that when her child was approximately six years old

she took him to a park. She stated that parents of other children in the park told their children to stay away from the respondent due to his disease. The respondent concluded accurately that the Russian society does not tolerate people with disabilities.

The respondent also testified as to another incident of past persecution where young men grabbed her child and was carrying him [to] a lake in a park. Respondent chased after these young men who then dropped the respondent's child. Respondent's child suffered a broken arm and injuries to his face. He was hospitalized for a period of two months.

The respondent also testified to another incident of past persecution where the respondent was in a park with her son. A woman noticed that her son had touched some clothing. This woman became enraged and pushed the respondent's child to the ground. The respondent's child suffered a severe laceration to his head which required medical treatment at a hospital.

The respondent claims that the above incidents of persecution were on account of the fact that the respondent and her family are members of the particular social group known as family members of children who are disabled.

The respondent also testified as to incidents of persecution based on her political opinion. The respondent testified that she joined an organization which cared for families. She also joined the Moon quasi-religious organization. The respondent believes that due to her participation in these organizations she suffered past persecution. She stated that after attending a meeting of the organization to protect families, people threw stones at her and threw stones at her automobile

The respondent also believes that due to her political opinion and due to the fact that she is a member of a particular social group singled-out for persecution, that her husband was laid off from his job and was unable to secure employment for a period of two years.

There was truly no connection between these incidents of harm and any of the grounds stated in the asylum statute. There was no evidence to show that there was a connection between the respondent's husband being laid off and the fact that the respondent has a political opinion and is a member of a particular social group. The other incident of harm concerned the throwing of rocks at the respondent. It can be assumed that individuals may have thrown stones at the respondent because she was attending a meeting of the organization to protect families, however, there was very little evidence to support this conclusion.

ANALYSIS

I find that the respondent and her family and child did suffer harm in Russia. It does appear that this harm was a result of the fact that the respondents are a member of the particular social group described above. The Court, however, concludes that the harm suffered by the respondent does not rise to the level of persecution. The fact that the respondent's son was unable to get the quality of medical treatment that he can secure in the United States is not persecution. The fact that the respondent's child was prevented from attending public schools is a more troubling issue. It is unclear as to why the respondent's child was unable to attend public school. It could be argued that the government of Russia is attempting to punish handicapped people by preventing them from attending public school. It could also be concluded from the facts in this

case that the Russian government does not hav sufficient resources to provide adequate schooling fo handicapped children. This Court takes notice of th documents concerning country conditions in Russia. I is clear that Russia is in dire economic straits. Th government of Russia does not have the resources t provide medical attention to individuals at the sam standards as in developed nations. The government o Russia also does not appear to have sufficient resource to educate handicapped children. This conclusion i based on a thorough reading of the entire Countr Reports prepared by the United States Department o State.

This Court finds that there are two sections of th Country Reports for Human Rights Practices for th year 2000 which should be included in this oral decisio I, therefore, incorporate by reference the sections o the Country Reports which are entitled "Children" an "People with Disabilities." The portion of the Countr Reports concerning children shows that children i Russia are certainly not treated as they are in mor developed nations. I will now quote a portion of thos Country Reports: "Although comprehensive statistic are not available, the prospects of children/orphans wh are disabled physically or mentally are extremely bleak The label of 'imbecile' or idiot, which signifies un educatable, is almost always irrevocable. The mos likely future is a lifetime in state institutions."

I wish to quote from another portion of the Countr Reports as follows: "The constitution does not addres directly the issue of discrimination against disable persons. Although laws exists that prohibit discrimi nation, the government has not enforced them. Th meager resources that the government can devote t

assisting disabled persons are provided to veterans of World War II and other conflicts. Special institutions exists for children with various disabilities, but do not serve their needs adequately."

As stated earlier, I find that the harm suffered by the respondent's family and her disabled child do not rise to the level of persecution. I, therefore, find that there is substantial discrimination against individuals with disabilities in Russia, however, that discrimination does not rise to the level of persecution. I find there has been no proof that either the respondent, her husband, or her child, suffered past persecution on account of any of the grounds stated in the asylum statute.

The respondent stated that she believed that if she returns to Russia with her family, her child will be killed and she and her husband may be imprisoned. This was a general statement which lacked any factual basis. It should be noted that the respondent and her child were able to live in Russia for a substantial period of time without being placed under arrest. It should also be noted that although the respondent was pressured to abandon her child, she was allowed to continue to live with her child and care for her child. It should further be noted that the respondent was allowed to leave Russia with her family on three separate occasions to come to the United States to secure adequate medical treatment for her child. The respondent and her family traveled to the United States on two different occasions in 1994. The purpose of those visits was to secure medical treatment for their child. The last entry to the United States by this family occurred on September 9th, 2000. The respondent informed the consular officers that she wished to have a visa to come

to the United States for the purpose of continuin treatment for her child.

Based on the above, I find that the respondent ha not borne her burden of proof that she has a well founded fear of persecution if she is returned to Russia I further find that the respondent's husband or chil have a well-founded fear of persecution if they're re turned to Russia. Based on these findings, I must den the application for asylum.

Since the application for withholding of removal an relief under the Convention Against Torture requires more stringent standard of proof, I find that the respor dents have not borne their burden of proving that the are entitled to withholding of removal or relief unde the Convention Against Torture.

Since there are no other relief applications pending, must therefore deny all applications for relief filed b the respondents and order that all three respondents b removed from the United States to Russia.

ORDERED

IT IS HEREBY ORDERED that the applications fo asylum, withholding of removal, and relief under th Convention Against Torture be denied.

IT IS FURTHER ORDERED that all three respor dents be removed from the United States to Russia o the charges contained in their individual Notices t Appear.

/s/ ANTHONY ATENAIDE
ANTHONY ATENAIDE
U.S. Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-71129
Agency Nos. A75-772-599, A75-772-600, A75-772-601

VICTORIA TCHOUKHROVA; DMITRI TCHOUKHROV;
EVGUENI TCHOUKHROV, PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,
RESPONDENTS

Filed: Dec. 5, 2005

ORDER

Before: STEPHEN REINHARDT, A. WALLACE TASHIMA, and KIM MCLANE WARDLAW, Circuit Judges. Dissent by Judge KOZINSKI.

The panel has voted to deny the petition for panel rehearing and petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

KOZINSKI, Circuit Judge, with whom Judge O'SCANNLAIN, TALLMAN, RAWLINSON, BYBEE CALLAHAN and BEA join, dissenting from denial of rehearing en banc:

This case presents a question of exceptional importance with profound implications for our nation's immigration laws. The panel permits an applicant to claim asylum based on the harms suffered by her child. *See Tchoukhrova* v. *Gonzales*, 404 F.3d 1181, 1190 (9th Cir. 2005) ("[T]he harms suffered by a disabled child [may] be taken into account when determining whether to grant his parent's asylum application."). By allowing the harms suffered by a child to be imputed to the parent, the panel in effect creates a reverse derivative asylum claim—something expressly barred by 8 C.F.R. § 207.7(b)(6), which provides that "[t]he following relatives of refugees are *ineligible* for accompanying or following-to-join benefits . . . [a] *parent*, sister, brother, grandparent, grandchild, nephew, niece, uncle, aunt, cousin or in-law." *Id.* (emphasis added).

This exotic reading of the immigration statute was never discussed by the IJ, the BIA or even the parties—rather, it is something the panel comes up with on its own. Whatever the merits of such an approach, the panel concedes that neither the IJ nor the BIA "discuss[ed] the question expressly." *Tchoukhrova*, 404 F.3d at 1190. It strains credulity to suggest that the IJ and the BIA would have adopted such a sweeping change to the interpretation of the immigration statute without thinking long and hard about what they were doing. In *INS* v. *Ventura*, 537 U.S. 12, 15-17 (2002) (per curiam) (summary reversal), the Supreme Court told us in no uncertain terms that the agency charged with administering the statute gets first crack at ruling on

its construction. It has taken us less than three years to work our way around this rule.

The facts of the case are, indeed, sad and compelling. Evgueni Tchoukhrova was born in 1991 in Valdivostok, Russia, with cerebral palsy. He was treated badly in his first two months of life. Although his parents, Victoria and Dmitri, tried to provide for him, they encountered hostility from neighbors and indifference from the Russian government. Their government doctor recommended that Evgueni be institutionalized, or at the very least "isolated at home." Evgueni also suffered other injuries that the government failed to correct or investigate. *Tchoukhrova*, 404 F.3d at 1184-85.[1]

As a result of the government's indifference and hostility, Evgueni's parents joined with others and sought to raise public awareness of the plight of disabled

---

[1] The government disputes key parts of the panel's factual summary, noting that the panel accepts as true certain allegations not presented at the hearing and that the IJ had no opportunity to adjudicate. For example, the government argues that the panel's finding that Evgueni was treated as "medical waste," *id.* at 1184, was not part of the IJ's findings and is an unexhausted claim on which the panel engages in original factfinding, *see* Respondent's Petition for Rehearing En Banc at 9 & n.3. The government also disputes the panel's finding that Evgueni was placed in an "internaty" during his first few months of life. *See Tchoukhrova*, 404 F.3d at 1193. ("[A]n internaty is an orphanage for abandoned orphans from 5 to 17 years old who have been diagnosed as uneducable because of severe mental impairment." Respondent's Petition for Rehearing En Banc at 10 n.4 (internal quotation marks omitted).) As the government points out in its Petition for Rehearing En Banc, the IJ found, and Victoria testified, that Evgueni was placed in a hospital, not an internaty. *Id.* (citing Certified Administrative Record at 56, 95). Because the facts included by the panel have no bearing on my dissent, I accept the panel's factual recitation.

children in Russia. The Tchoukhrovas endured mino harassment and their car was vandalized. Later Dmitri was fired from his job and told during subse quent job interviews that he should stop advocating fo rights for the disabled. *Tchoukhrova*, 404 F.3d at 118(Victoria filed an application for asylum and withholdin of removal, and listed both Evgueni and Dmitri a derivative applicants. *Id.* at 1187; *see also* 8 U.S.C § 1158(b)(3)(A) (spouse and children of principal appli cant may be granted asylum if accompanying, o following to join, principal applicant). The IJ foun Victoria's testimony credible and determined that he family belonged to a particular social group, "namely, ' family whose child is severely disabled.'" *Tchoukhrov* 404 F.3d at 1187. The IJ also found that the harm suffered by the family were on account of their mem bership in that group and that the government c Russia was responsible for the harms the group su fered because "Russia wishes to isolate handicappe children." *Id.* However, the IJ found that the harm suffered by the social group did not amount to pe secution. *See* Certified Administrative Record at 6 The BIA, in a summary ruling, adopted the IJ's decisio and denied relief, citing *Matter of Burbano*, 20 I. & N Dec. 872 (BIA 1994), "which holds that 'the Board final decision may be rendered in a summary fashion and that, in such cases 'the Board conclusions upo review of the record coincide with those which th immigration judge articulated in his or her decision.' *Tchoukhrova*, 404 F.3d at 118 (quoting *Burbano*, 20 I. N. Dec. at 874).

The panel overrules the BIA and rejects its finding no past persecution of the social group, holding that th finding was not supported by substantial evidence. *S*

id. But finding that a *group* was persecuted doesn't mean that every member of the group was persecuted. Rather, once an asylum petitioner has shown that he is a member of a persecuted group, he must still show that he himself has suffered or is likely to suffer persecution. *See, e.g., Hoxha* v. *Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003) (holding that '[asylee's] fear must be based on an individualized rather than generalized risk of persecution"); *Avetova-Elisseva* v. *INS*, 213 F.3d 1192, 1201 (9th Cir. 2000) (finding a well-founded fear of future persecution based on "a singling out of the petitioner so that an established current pattern of persecution of members of the group to which she belongs carries the personalized threat of *her* future persecution").

After finding that the Tchoukhrovas were members of a persecuted group, therefore, the panel was required to consider whether the asylum petitioner—here, Victoria—had herself suffered persecution. Instead of focusing on the harms suffered by Victoria, the panel holds that "the harms inflicted on the family members [must be treated] cumulatively," and thus "the harms suffered by a disabled child [may] be taken into account when determining whether to grant his parent's asylum application." *Tchoukhrova*, 404 F.3d at 1190. Although the panel admits that the agency never expressly discussed the issue, *id.*, the panel goes on to decide that "a parent of a disabled child may file as a principal applicant in order to prevent the child's forced return to the family's home country and may establish her asylum claim on the basis of the persecution inflicted on or feared by the child," *id.* at 1192.

Asylum claims are normally individual petitions, i.e., for the benefit of the petitioner. *See, e.g.*, 8 U.S.C.

§ 1158(a)(2)(D) ("An application for asylum of *an alie* may be considered . . . if *the alien* demonstrates . . the existence of changed circumstances which mater ally affect *the applicant's* eligibility for asylum. . . .' (emphasis added). The asylum statute does permit th filing of a derivate claim, that is, a claim based o another person's eligibility, in narrowly delimited ci cumstances: Derivative asylum claims may be filed o behalf of an eligible petitioner's spouse and childre *See id.* § 1158(b)(3). However, the regulations gover ing the admission of refugees expressly provide tha "[t]he following relatives of refugees are *ineligible* fc accompanying or following-to-join benefits . . . [a *parent*, sister, brother, grandparent, grandchild, ne hew, niece, uncle, aunt, cousin or in-law." 8 C.F.I § 207.7(b)(6) (emphasis added). The regulatory schem unmistakably provides than an asylum seeker ma include his spouse and children as derivative applicant but may not include his parents or other relatives.

Here, the harms suffered directly by Victoria a clearly not enough to amount to persecution; it is on the harms suffered by Evgueni that could possibly su port an asylum claim. But Evgueni is not the princip applicant; even if he were, he could not confer deriv tive status on his parents. The panel recognizes thi noting that "if the child is the principal applicant and granted asylum, the child can legally stay in th country, but his parents will be removed." *Tchouk rova*, 404 F.3d at 1191. The panel avoids this har result by inventing a doctrine of persecution renvoi: holds that Victoria may file as the principal applica and use the harms suffered by Evgueni to support *h* persecution claim, and thus enable Evgueni to file as derivative applicant. *See id.* at 1192. The panel th

permits persecution suffered by a child to be considered in support of his mother's persecution claim, which then permits the child (i.e., the only one who has actually suffered persecution) to be treated as a derivative applicant for asylum on the mother's application (even if the mother has personally suffered no persecution).

This reading of the immigration statute is, to put it mildly, strained. Congress adopted section 1158(b)(3) to provide for asylum for a clearly limited class of family members of those who were persecuted. The statute is quite specific that only the spouse and children of a principal applicant are entitled to derivative status. *See* 8 U.S.C. § 1158(b)(3). Parents are expressly not. *See* 8 C.F.R. § 207.7(b)(6). By assessing harms cumulatively, the panel moots this carefully drawn statutory scheme, and obviates the need for derivative status in the first place. Under the panel's reasoning, section 1158(b)(3) becomes mere surplusage, since the spouse and children of the principal applicant will *themselves* file as principal applicants once familial harms are assessed "cumulatively." This is all very new law.[2]

---

[2] We have held that it may be appropriate to consider the harm suffered by family members in evaluating whether the principal applicant suffered persecution. For example, persecution suffered by one's relatives may corroborate an applicant's claim that he himself was persecuted. *See, e.g., Mashiri* v. *Ashcroft*, 383 F.3d 1112, 1120-21 (9th Cir. 2004); *Baballah* v. *Ashcroft*, 367 F.3d 1067, 1074-75 (9th Cir. 2004); *Salazar-Paucar* v. *INS*, 281 F.3d 1069, 1071, 1075 (9th Cir.), *amended by*, 290 F.3d 964 (9th Cir. 2002). Or, the government might target the children of its enemies as a means of persecuting their parents. *Cf. Thomas* v. *Gonzales*, 409 F.3d 1177, 1184, 1189 (9th Cir. 2005) (en banc) (holding that the targeting of family members "on account of their shared, immutable characteristic, namely, their familiar relationship," may

Even if this interpretation might ultimately preva
the BIA is entitled under *Chevron* to consider it in t
first instance. *See Chevron U.S.A. Inc.* v. *Natural Re
Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984). T
panel claims that the agency, in fact, has already do

---

constitute persecution). But that is quite different from what
have here.

The harm suffered by Evgueni is *not* evidence that Victo
suffered similar harm. That Evgueni may have received ina
quate medical care for his cerebral palsy says nothing about
quality of medical care that Victoria—an able-bodied adult—
received or will receive in Russia. Nor does the fact that strang
may have taunted Evgueni for being disabled help prove t
Victoria will be similarly taunted. Nor is there any allegation t
the government targeted Evgueni in a byzantine plot to pun
Victoria. Rather, the panel holds that the mere fact that Evgu
suffered harm is—without more—sufficient to impute that harm
Victoria for purposes of considering her asylum application. T
is a quantum leap that our cases do not support and the stat
prohibits.

Cases involving forced sterilization are likewise inappos
because "forced sterilization is a unique kind of persecution" t
inflicts a similar harm—depriving the family of any chance to p
create—on the husband. *Qu* v. *Gonzales*, 399 F.3d 1195, 1202
(9th Cir. 2005); *see also In re Y-T-L-*, 23 I. & N. Dec. 601, 607 (B
2003) ("Coerced sterilization is better viewed as a permanent
continuing act of persecution that has deprived a *couple* of
natural fruits of conjugal life, and the society and comfort of
child or children that might eventually have been born to the
(emphasis added)). Whereas sterilizing a wife in effect sterili
her husband, providing Evgueni with inadequate medical care
not in any way affect his mother's health. *Qu* and *Y-T-L-* did
involve derivative claims or the imputing of harm from
member of a family to another. Rather, the claims for withhold
of removal in *Qu* and *Y-T-L-* were based on the fact that e
petitioner had, in effect, been sterilized by the authorit
mistreatment of his wife. Unlike here, the harm to the petition
in *Qu* and *Y-T-L-* was direct, not derivative.

this, but it is clear from the record that the agency did nothing of the sort. The panel maintains that the agency effected this sea-change in our immigration laws "[w]ithout discussing the question expressly," *Tchoukhrova*, 404 F.3d at 1190, pointing to a stray phrase in the IJ's oral decision, which it rips out of context and then claims was adopted chapter and verse by the BIA. Both steps in its analysis are fatally flawed.

As to the IJ, it is clear that he treated the harms to the family cumulatively only for purposes of determining whether the social group in question—here, the family of a disabled child—was persecuted. In making that determination, it was of course necessary to consider the harms suffered by the group cumulatively–just as one would consider the harms suffered by all Sikhs in a part of India in determining whether Sikhs as a group are subject to persecution.

Cumulating all the harms suffered by the Tchoukhrovas, the IJ found that the group had suffered no persecution. *See* Certified Administrative Record at 61. Having made that determination, the IJ had no reason to go on to the next step and figure out whether individuals in the group had been persecuted. His next statement that "there has been no proof that either the respondent, her husband, or her child, suffered past persecution on account of any of the grounds stated in the asylum statute," *id.*, thus could not, as a matter of either law or logic, have been a finding as to individual harms; rather, it was a restatement of his determination that the social group had not suffered persecution because none of its members had been persecuted. Restatements or summaries are common in oral rulings, and it does the IJ an injustice to take his words wholly

out of context and attribute to them a meaning he coul not possibly have intended.

Nor, of course, did the BIA "adopt" the IJ's suppose determination that, in assessing individual harm persecution of one family member may be attributed t all others, and vice versa. Petitioner advanced no suc theory before the BIA, and thus the BIA, in a case i which the IJ had found *no* group persecution, had r occasion to consider what the IJ might have said abo how individual harms are to be assessed. In affirmir the IJ under *Burbano*, the BIA did nothing more tha agree with the IJ that no group persecution had bee established. But a *Burbano* affirmance signals on that the BIA had adopted the IJ's decision with respe to those issues adequately raised on appeal; it does n equate to an acceptance of the IJ's entire decision wh only parts of that decision are appealed. *See Mabug* v. *INS*, 937 F.2d 426, 430 (9th Cir. 1991) (dismissi arguments petitioner failed to raise before the BIA The BIA could not have imagined that by summari affirming the IJ's denial of relief, it was actually cutti a large hole in the fabric of our immigration laws.

As the government warns in its Petition for Rehea ing En Banc, the panel's opinion has far-reaching imp cations, and the issues raised therein are likely to r occur with increasing frequency. *See, e.g., Abay Ashcroft*, 368 F.3d 634, 641-42 (6th Cir. 2004) (granti asylum to mother based on her fear that her daught will be subjected to female circumcision); *Oforji Ashcroft*, 354 F.3d 609, 618 (7th Cir. 2003) (holding female circumcision case that "an alien parent who h no legal standing to remain in the United States m not establish a derivative claim for asylum by pointi to potential hardship to the alien's United States citiz

child in the event of the alien's deportation"). Despite the panel's best efforts to muddy the waters, the fact is, the IJ and the BIA did nothing like what the panel attributes to them; they'd surely be shocked at the suggestion that they did. *Ventura* requires a remand so the agency can, in the first instance, rule on the inventive arguments adopted by the panel, arguments that were neither raised below nor by any of the other parties on appeal.

Because this decision is nothing but a big end-run around *Ventura*, we should have taken the case en banc and repaired the damages ourselves.

APPENDIX E

1. 8 U.S.C. 1101(a)(42) provides in pertinent part:

§ 1101. Definitions

(a) As used in this chapter—

* * * * *

(42) The term "refugee" means (A) any pers who is outside any country of such person nationality or, in the case of a person having nationality, is outside any country in which su person last habitually resided, and who is unable unwilling to return to, and is unable or unwilling avail himself or herself of the protection of, th country because of persecution or a well-found fear of persecution on account of race, religio nationality, membership in a particular social grou or political opinion, or (B) in such special circu stances as the President after appropriate consult tion (as defined in section 1157(e) of this title) m specify, any person who is within the country such person's nationality or, in the case of a pers having no nationality, within the country in whi such person is habitually residing, and who persecuted or who has a well-founded fear of pers cution on account of race, religion, nationality, me bership in a particular social group, or politi opinion. The term "refugee" does not include a person who ordered, incited, assisted, or otherwi participated in the persecution of any person account of race, religion, nationality, membership a particular social group, or political opinion. F purposes of determinations under this chapter person who has been forced to abort a pregnancy to undergo involuntary sterilization, or who h

been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

* * * * *

2. 8 U.S.C. 1158 (2000 & Supp. II 2002) provides:

§ 1158. Asylum

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

* * * * *

(b) Conditions for granting asylum

(1) In general

The Attorney General may grant asylum to a alien who has applied for asylum in accordanc with the requirements and procedures estal lished by the Attorney General under this sectic if the Attorney General determines that suc alien is a refugee within the meaning of sectic 1101(a)(42)(A) of this title.

* * * * *

(C) Additional limitations

The Attorney General may by regulatic establish additional limitations and condition consistent with this section, under which a alien shall be ineligible for asylum unde paragraph (1).

* * * * *

(3) Treatment of spouse and children

(A) In general

A spouse or child (as defined in sectic 1101(b)(1)(A), (B), (C), (D), or (E) of this title) o an alien who is granted asylum under th subsection may, if not otherwise eligible fc asylum under this section, be granted the sam status as the alien if accompanying, or followir to join, such alien.

* * * * *

(d) Asylum procedure

(1) Applications

The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a) of this section. The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney General.

* * * * *

3. 8 U.S.C. 1231(b)(3) provides in pertinent part:

§ 1231. Detention and removal of aliens ordered removed

* * * * *

(b) Countries to which aliens may be removed

* * * * *

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

* * * * *

(3)

No. 05-1401

AUG 4 - 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Petitioner,

v.

VICTORIA TCHOUKHROVA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DICK THORNBURGH
JONATHAN M. YOUNG
KIRKPATRICK & LOCKHART NICHOLSON GRAHAM LLP
1601 K Street, NW
Washington, DC 20006

SAMUEL R. BAGENSTOS
One Brookings Drive
Box 1120
St. Louis, MO 63130

JONATHAN D. MONTAG
Counsel of Record
MONTAG & NADALIN LLP
110 West C Street,
Suite 1809
San Diego, CA 92101
(619) 230-1420

LAURA A. WYTSMA
SONNENSCHEIN NATH & ROSENTHAL LLP
601 S. Figueroa Street,
Suite 1500
Los Angeles, CA 90017

(Additional Counsel Listed On Inside Cover)

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

DEBORAH ANKER
HARVARD IMMIGRATION
AND REFUGEE CLINIC
197 Friend Street
Boston, MA 02114

GREGORY R. NARON
SONNENSCHEIN NATH
& ROSENTHAL LLP
7800 Sears Tower
Chicago, IL 60606

KAREN MUSALO
STEPHEN KNIGHT
CENTER FOR GENDER
& REFUGEE STUDIES
University of California
Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102

QUESTIONS PRESENTED

1. Whether *INS v. Ventura*, 537 U.S. 12 (2002) (*per curiam*), and *Gonzales v. Thomas*, 126 S. Ct. 1613 (2006) (*per curiam*), required the Court of Appeals to remand to permit the Board of Immigration Appeals to rule on an issue the Board had already decided.

2. Whether *Ventura* and *Thomas* required the Court of Appeals to remand to permit the Government to assert a defense that it had never raised in the administrative process or at any time before the Court of Appeals issued its panel opinion.

3. Whether the Court of Appeals erred in concluding that the Board's "persecution" determination was not supported by substantial evidence.

TABLE OF CONTENTS

	Page
STATEMENT	1
A. The Facts	1
B. Proceedings Below	7
REASONS FOR DENYING THE WRIT	14
I. The Decision of the Court of Appeals Does Not Conflict with This Court's Rulings in *Ventura* and *Thomas*	15
A. The Court of Appeals Created No "New Rule" of "Reverse Derivative Asylum"	16
B. *Ventura* and *Thomas* Did Not Require a Remand on the Issues of Changed Circumstances and the Possibility of Relocation	22
II. The Government's Challenge to the Court of Appeals' Persecution Determination Does Not Warrant Review	27
CONCLUSION	30
APPENDIX A Respondent's Petition for Rehearing En Banc filed August 8, 2005	1a
APPENDIX B Brief for Respondent filed December 3, 2003	20a

TABLE OF AUTHORITIES

Page

CASES

Abay v. Ashcroft, 368 F.3d 634 (6th Cir. 2004) 21

Abebe v. Gonzales, 432 F.3d 1037 (9th Cir. 2005) 19

Alaska Department of Environmental Conservation v. EPA, 540 U.S. 461 (2004) 26

Burbano, In re, 20 I. & N. Dec. 872 (B.I.A. 1994) 11

Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948) 26

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 19

C-Y-Z-, In re, 21 I. & N. Dec. 915 (B.I.A. 1997) 21

Ghebremedhin v. Ashcroft, 392 F.3d 241 (7th Cir. 2004) 24, 26

Gishta v. Gonzales, 404 F.3d 972 (6th Cir. 2005) 11

Gonzales v. Thomas, 126 S. Ct. 1613 (2006) ..... *passim*

Hayburn's Case, 2 U.S. 408, 2 Dall. 409 (1792) 15, 26

INS v. Abudu, 485 U.S. 94 (1988) 26

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 8

INS v. Elias-Zacarias, 502 U.S. 478 (1992) 28

INS v. Stevic, 467 U.S. 407 (1984) 8

INS v. Ventura, 537 U.S. 12 (2002) (*per curiam*) ..... *passim*

Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991) 12

Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983) 14

NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969) 26

TABLE OF AUTHORITIES – Continued

Page

SEC v. Chenery Corp., 318 U.S. 80 (1943) 14, 17, 18

Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005) (*en banc*), rev'd sub nom. *Gonzales v. Thomas*, 126 S. Ct. 1613 (2006) (*per curiam*) ..... *passim*

United States v. Tisor, 96 F.3d 370 (9th Cir. 1996) 12

United States v. United Foods, Inc., 533 U.S. 405 (2001) 23, 24

United States v. Winstar Corp., 518 U.S. 839 (1996) 22

Woodford v. Ngo, 126 S. Ct. 2378 (2006) 25

STATUTES AND REGULATIONS

Immigration and Nationality Act, 8 United States Code

8 U.S.C. § 1101(a)(42) 1

8 U.S.C. § 1101(a)(42)(A) 1, 7

8 U.S.C. § 1158 7

8 U.S.C. § 1158(b)(3) 20

8 U.S.C. § 1231(b)(3) 8

8 Code of Federal Regulations

8 C.F.R. § 207.7 19

8 C.F.R. § 207.7(b)(6) 20

8 C.F.R. § 1003.1(b)(9) 10

8 C.F.R. § 1003.1(e) 11

8 C.F.R. § 1003.1(e)(4)(ii) 11

8 C.F.R. § 1208.13(b)(1) 8

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents Victoria, Dmitri, and Evgueni Tchoukhrov respectfully oppose the Petition for a Writ of Certiorari filed by the Attorney General of the United States.

STATEMENT

The Court of Appeals below held that Victoria Tchoukhrova was eligible for asylum and entitled to withholding of deportation. The court concluded that Russia's horrific treatment of Victoria and her child, Evgueni, who has cerebral palsy, gave her a "well-founded fear of persecution." 8 U.S.C. § 1101(a)(42)(A). In so holding, the court agreed with nearly all of the determinations the Board of Immigration Appeals made in this case. In particular, the court agreed with the agency's conclusions "that the respondent and her family and child did suffer harm in Russia" and that the harm "was a result of the fact that the respondents are a member of the particular social group" of family members of children with disabilities. Pet. App. 37a. As did the agency, the court treated the harm to her child as relevant to determining whether Victoria herself was persecuted. See *id.* at 37a-39a. The Court of Appeals disagreed with the agency on only one point: Where the agency determined that the Tchoukhrovs' treatment amounted to "discrimination" but not "persecution," *id.* at 39a, the Court of Appeals held that "the record compels the conclusion that the harm suffered by the Tchoukhrovs constituted persecution within the meaning of 8 U.S.C. § 1101(a)(42)." *Id.* at 20a. That factbound decision, which broke no new legal ground, does not warrant this Court's review – much less the summary reversal the Government seeks.

A. The Facts

1. The Tchoukhrovs' Persecution – In 1991, Victoria and Dmitri Tchoukhrov married and conceived a son. Administrative Record ("A.R.") 332. In October 1991, Victoria went

into labor and delivered her baby at the state-owned hospital in Vladivostok, Russia. *Id.* at 200. After inducing Victoria, hospital staff abandoned her for the entire night, during which time her unborn child was deprived of oxygen. *Id.* The next morning, Victoria's induced labor had stopped and the hospital personnel decided to forcibly extract Victoria's baby from her body; they broke his neck in the process. *Id.* Victoria's body was "virtually mutilated" as they forced the baby out of her "with no regard to [her] safety." *Id.* at 201. As a result of this grossly botched delivery, Victoria's son, Evgueni, suffered a severe spinal injury that caused cerebral palsy. *Id.* at 200.

Instead of giving the newborn child medical care, the hospital initially threw Evgueni into a container holding abortion and other medical waste. A.R. at 201.[1] Victoria, having "lost a lot of blood," fell into a state of unconsciousness. *Id.* When she regained consciousness, the hospital refused to show Victoria her new son. *Id.*

Despite being cast aside with the medical waste, Evgueni survived. *Id.* Victoria pleaded to see her son. *Id.* at 93-94, 201. She was told that he was severely disabled and that she should "refuse" him, because "they didn't see the reason why he needed to live." *Id.* at 92, 99. For the first five days of her son's life, the state hospital barred Victoria from seeing her newborn son. *Id.* at 93. Finally,

---

[1] The Government asserts (Pet. 17 n.4) that this fact should not have been considered by the Court of Appeals. But Victoria Tchoukhrova's affidavit, which contains this fact, is a part of the record in this case and was expressly considered by the immigration judge. Pet. App. 33a. Indeed, the immigration judge discussed Victoria's affidavit and swore her to its contents during a hearing. A.R. 85-88. Victoria did not present further evidence on this point because the immigration judge specifically stated that "it appears to me, from my review of the case, that the facts are relatively clear and I don't think we need to go through seven hours of testimony to confirm these facts." *Id.* at 80. Because the immigration judge found Victoria credible and the Board affirmed that finding, see p. 9, *infra*, the circumstances surrounding her son's birth were properly considered by the Court of Appeals.

Victoria managed to convince a nurse to let her visit her child in the middle of the night because she "wanted desperately to see him and to hold his lifeless body close to [her] heart." *Id.* at 201. Victoria snuck into a room where her son was held separately from the healthy infants. *Id.*

Throughout this time, the state hospital pressured the Tchoukhrovs to give up their son. A.R. at 94-95, 201. The Tchoukhrovs refused. Despite their objections, the government forcibly separated Victoria from her son by transferring Evgueni to an institution for orphaned children with birth defects.[2] *Id.* at 95, 202. The government refused the new parents permission to see their son for two months. *Id.* at 96-97.

The state continued pressuring the Tchoukhrovs to sign a document ceding their parental rights. *Id.* at 202. Even in her weak state, Victoria wrote letters, made phone calls, and visited agency after agency trying to fight for the right to bring her own child home. *Id.* at 201.

When the Tchoukhrovs finally gained entrance to the "hospital" for children with birth defects, the conditions were horrifying. A.R. at 97. The children were wrapped in old, wet, dirty linens and cried out from hunger. *Id.* No one cleaned or otherwise took care of them. Some children writhed in pain but received no treatment. *Id.* at 97-98. Notwithstanding intense pressure from state authorities to consent to Evgueni's permanent institutionalization, Victoria and Dmitri secured his release after two months and put him in a private clinic. *Id.* at 99-100, 202.

When Evgueni was one year old, he was diagnosed as having infantile cerebral palsy. *Id.* at 100-101. The Russian government then labeled him disabled and (because

---

[2] Although the Government describes that institution euphemistically as a "government hospital for children" (Pet. 7), that rosy depiction is belied by the immigration judge's own description of the "deplorable" conditions where Evgueni was "confined" for two months and "deprived of his parents" – children were "wrapped in old and dirty linen," "wet and dirty," "not properly fed" or even cleaned. Pet. App. 34a-35a.

his mother would not permit him to be vaccinated due to his compromised immune system) barred any public medical support for his condition. *Id.* at 203. The government also refused to allow the Tchoukhrovs to enroll Evgueni in public school, even though his disability was physical, not mental. *Id.* at 101, 202.

Evgueni's government doctor told the Tchoukhrovs that if they refused to institutionalize their son, he should "be isolated at home" and not taken out into public places. A.R. at 101-102. Indeed, when Victoria took Evgueni out in public, people verbally abused and spat upon them. *Id.* at 203. Victoria "often" heard parents say to their children: "Get away from that boy, can't you see he's abnormal" or "Don't get near him, he's sick." *Id.* at 332.

Twice, Victoria watched as strangers assaulted her young son so severely that he required hospitalization, and the Russian government refused to do anything about it.[3] During one visit to the park when Evgueni was six, several young men attacked him. *Id.* at 203. Victoria witnessed the men break Evgueni's arm and cause severe head trauma that required hospitalization for two months and led to insomnia, spontaneous crying, shaking, and paranoia. *Id.* Although Victoria and Dmitri filed a police report, government authorities did not investigate. *Id.* at 121. On another occasion, a woman yelled at Victoria, "Get your ugly imbecile out of here," and shoved Evgueni to the ground. *Id.* at 127, 332. He was rushed to the emergency room and received several stitches in his head, from which

---

[3] The Government's statement that the two incidents of violence were "not mentioned in [Victoria's] asylum application" (Pet. 7) is simply not true. They are specifically mentioned in Victoria's Affidavit incorporated into her asylum application. A.R. 195, 200-204. Moreover, it is beside the point: The immigration judge specifically found "that the respondent explained adequately why she did not place all of the alleged past persecution incidents in her initial asylum application." Pet. App. 33a. And he made specific findings of fact regarding the two incidents of violence. *Id.* at 36a.

he still has a visible scar. *Id.* at 127. Victoria again filed a police report; this time, the police told her the matter was insignificant and that she should settle it herself. *Id.* at 332. After these incidents, Evgueni became so frightened that he refused to leave the house. *Id.* at 128, 333.

As the family faced continued harassment and violence and continued government pressure to institutionalize or isolate Evgueni, Victoria and Dmitri decided to take political action. They joined with other parents of disabled children and founded an association "that opposed the prevailing oppressive conditions of the handicap [sic] children," called "Mothers-Unite!" A.R. 202. Victoria worked toward the publication of a newspaper article criticizing the Russian government's treatment of disabled children, but the proposed article was cancelled at the last minute. *Id.* at 203. The couple spoke to the authorities about the treatment of children with disabilities and wrote letters demanding equal rights. *Id.* at 115, 201-202.

The family also sought help from the Moon Society; this action only provoked additional harassment. *Id.* at 117, 203. After one meeting, people threw stones at Victoria and vandalized the family's car. When Dmitri complained to the police, the authorities failed to respond. *Id.* at 203. In 1997, Dmitri was fired from his job as a civil engineer and was unable to find employment for two years; during several job interviews, Dmitri was urged to stop advocating for the disabled. *Id.* at 117-118, 203.

Facing continued hostility toward the family and certain that they would never be able to adequately protect their son, the Tchoukhrovs left Russia for the last time. *Id.* at 90-91.[4] The family entered the United States on September 9, 2000. *Id.* at 90.

2. The Persecution of People with Disabilities in Russia – Two reports in the administrative record provided

---

[4] Prior to this last departure, Victoria and Evgueni had traveled to the United States twice for medical treatment. A.R. 90.

additional context and corroboration for the Tchoukhrovs' claim of persecution. The United States Department of State's country report for Russia found that children with disabilities are "removed from mainstream society and isolated in state institutions." A.R. at 241. It further found that "the prospects of children/orphans who are disabled physically or mentally are extremely bleak. The label of 'imbecile' or idiot, which signifies 'uneducable,' is almost always irrevocable. The most likely future is a lifetime in state institutions." *Id.* at 242.[5] The report noted that "[b]eing disabled is still a serious social stigma in the country, an attitude that profoundly influences how institutionalized children are treated." *Id.* In state institutions, "many disabled children are confined to beds around the clock or to rooms that are lit, heated, and furnished inadequately." *Id.* at 243.

The Department of State relied in part on a report prepared by Human Rights Watch. See A.R. at 242-243. That report found that Russian parents of children with even minor disabilities (such as "mild Down syndrome, cerebral palsy, and correctable conditions such as club foot and cleft palate") "are routinely pressured at the maternity ward to give up such infants." *Id.* at 270. Once placed in asylum-like institutions, or "*internaty*," the children "are exposed to shocking levels of cruelty and neglect." *Id.* at 254; see also *id.* at 258-259 (stating that "examples of inhuman and degrading treatment are all too common features of Russian orphanages, both for children with severe disabilities, and as well for those diagnosed as 'educable'"). The report singled out the harm to children with disabilities as especially severe (*id.* at 254):

> Once officially labelled as retarded, Russian orphans face another grave and consequential violation of their rights around the age of four, when

[5] The immigration judge specifically incorporated the relevant sections of the State Department's report in his decision. Pet. App. 38a.

> they are deemed "ineducable," and warehoused for life in psychoneurological *internaty*. In addition to receiving little to no education in such *internaty*, these orphans may be restrained in cloth sacks, tethered by a limb to furniture, denied stimulation, and sometimes left to lie half-naked in their own filth. Bedridden children aged five to seventeen are confined to understaffed lying-down rooms as in the baby houses, and in some cases are neglected to the point of death. Those who grow to adulthood are then interned in another "total institution," where they are permanently denied opportunities to know and enjoy their civil and political rights.

According to the Human Rights Watch report, those practices reflect the persistence of "Soviet-era policies" regarding the institutionalization of children. A.R. at 267. Even after the closing of the Gulag, the report concluded, the Russian government confines children with disabilities to "another archipelago of grim state institutions." *Id.* at 253.

B. Proceedings Below

In late January 2001, without any legal assistance, Victoria Tchoukhrova applied for asylum and withholding of removal. See A.R. at 323-333. Victoria listed both her son Evgueni and her husband Dmitri as derivative applicants. See *id.*[6] Under the relevant statute, an individual who is "unable or unwilling to return" home "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. § 1101(a)(42)(A), is eligible for asylum. See 8 U.S.C. § 1158. An applicant need not prove that he *will* be persecuted if returned to his

---

[6] She also applied for relief pursuant to the Convention Against Torture, but she has since abandoned that claim. See Pet. App. 9a n.2.

country; all he must show is a "reasonable possibility" of persecution, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987), and past persecution raises a presumption of future persecution, see 8 C.F.R. § 1208.13(b)(1). While the decision to grant asylum is discretionary, withholding of removal is mandatory; the Attorney General may not remove a person to a country where his or her "life or freedom" would be threatened in a country of removal because of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1231(b)(3). To qualify for withholding of deportation relief, an applicant must show a "clear probability of persecution," *viz.*, that it is "more likely than not" that he or she will be persecuted if deported to his or her home country. See *INS v. Stevic*, 467 U.S. 407, 429-30 (1984).

1. Administrative Proceedings – In April 2001, the Tchoukhrovs appeared before the immigration judge. A.R. 65-75. Victoria renewed her claims for asylum and withholding of removal. *Id.* at 73. The matter was continued for a merits hearing. *Id.* Before the hearing, Victoria filed a new asylum application providing a more detailed description of her asylum claim, including her past persecution and fear of future persecution if removed to Russia. *Id.* at 191-204; see *id.* at 73.[7]

At the outset of the merits hearing, the immigration judge admitted all the exhibits, including Victoria's asylum application and supporting affidavit, without any objection. A.R. 78. Significantly, the Government trial attorney made no objections to the admissibility or relevance of Victoria's sworn statement, which detailed harm to both herself and Evgueni. See *id.* at 200-204.

[7] Victoria's pretrial brief reiterated that she was seeking asylum based on both past persecution and her fear of future persecution in Russia. A.R. 182-183. Thus, the Government was squarely on notice that the then-current country conditions in Russia would be an important issue at the merits hearing.

Victoria testified in support of her application. A.R. 83-157. Although her testimony focused largely on the mistreatment of her son as evidence of her own persecution, the Government never objected once on relevance grounds. See *id.* At the hearing's conclusion, the immigration judge stated: "I agree with everything you say, I believed everything you said." *Id.* at 161-62.

Although the Government briefly cross-examined Victoria, it presented no evidence whatsoever. A.R. 138-150. The Government opposed Victoria's claim on the basis that the "problems" in Russia did not rise to the "level of persecution as enumerated in the statute." *Id.* at 159. The Government voiced no other grounds for its opposition. *Id.* Never did it raise the issue of changed country conditions, even when uncertain of the immigration judge's ultimate decision.

At the conclusion of the hearing the immigration judge issued a decision. He first addressed the issue of credibility and found Victoria's testimony "to be plausible, internally consistent, sufficiently detailed, and responsive to questions." Pet. App. 33a. Although he found that at times Victoria stated "broad *opinions* concerning possible past persecution" that may have been exaggerated, *id.* (emphasis added), he found her testimony regarding *facts* to be credible: "On the whole, I find the respondent was a credible witness." *Id.*

The immigration judge next discussed the circumstances Victoria and her family faced in Russia. Pet. App. 34a-39a. He concluded that the Tchoukhrovs were "member[s] of the particular social group described above," *viz.*, a family with a "severely disabled" child or child with a "debilitating disability." *Id.* at 34a, 36a, 37a. The immigration judge further found "that *the respondent and her family and child* did suffer harm in Russia" and "that this harm was a result of the fact that the respondents are a member of the particular group." *Id.* at 37a (emphasis added).

All of the social-group-related harm the immigration judge discussed involved the treatment of Evgueni, see Pet. App. 34a-39a,[8] but he did not reject Victoria's claim on that ground (nor did the Government so request). Rather, he concluded that the harm "d[id] not rise to the level of persecution." *Id.* at 37a. In particular, the immigration judge ruled that "[t]he fact that the respondent's son was unable to get the quality of medical treatment that he can secure in the United States is not persecution." *Id.* The Russian government, he concluded, simply "does not have the resources to provide medical attention to individuals at the same standards as in developed nations." *Id.* at 38a. The immigration judge found it "more troubling" that "the respondent's child was prevented from attending public schools." *Id.* at 37a. But he again determined that the Russian government "does not appear to have sufficient resources to educate handicapped children." *Id.* at 38a. Although the immigration judge ultimately found "that there is substantial discrimination against individuals with disabilities in Russia," he concluded that "that discrimination does not rise to the level of persecution." *Id.* at 39a. The immigration judge therefore denied all relief and ordered the Tchoukhrovs removed.

The Tchoukhrovs timely appealed to the Board of Immigration Appeals. See 8 C.F.R. § 1003.1(b)(9) (authorizing such appeals). In opposition, the Government filed a four-sentence brief that described the immigration judge's decision as "dispositive of all issues" regarding Victoria's asylum appeal. A.R. 17. The Board summarily affirmed

---

[8] The immigration judge did discuss Victoria's allegations that her husband, Dmitri, lost his job, but the judge found that "[t]here was no evidence to show that there was a connection between the respondent's husband being laid off and the fact that the respondent has a political opinion and is a member of a particular social group." Pet. App. 37a. The immigration judge also discussed Victoria's allegations that people threw stones at her when she attended a Moon Society meeting, but again he found no connection between that incident and her social group membership. See *id.* Victoria appealed those findings.

the immigration judge's decision in its entirety. Pet. App. 28a-29a. The summary affirmance invoked the Board decision *In re Burbano*, 20 I. & N. Dec. 872, 874 (B.I.A. 1994); see Pet. App. 29a. Under *Burbano*, 20 I. & N. Dec. at 874, the "Board's final decision may be rendered in a summary fashion" when the "Board's conclusions upon review of the record coincide with those which the immigration judge articulated." When the Board invokes *Burbano*, it adopts the immigration judge's decision in its entirety. In contrast to a streamlining decision under 8 C.F.R. § 1003.1(e)(4)(ii), which affirms only "the result reached" below as correct, without "imply[ing] approval of all of the reasoning of that decision," *id.*, a *Burbano* affirmance adopts both the reasoning and result of the immigration judge's decision. See *Burbano*, 20 I. & N. Dec. at 874; see also *Gishta v. Gonzales*, 404 F.3d 972, 980 (6th Cir. 2005).

2. *Judicial Review Proceedings* – The Tchoukhrovs petitioned for review in the United States Court of Appeals for the Ninth Circuit. A.R. 6. Before the Court of Appeals, the Government argued that substantial evidence supported the agency decision. See App., *infra*, at 42a-53a. However, in the event the circuit court found that substantial evidence did not support the immigration judge's findings on past and future persecution, the Government requested a remand for the agency to consider whether the past conduct or future fear was "on account of" a social group or political opinion. *Id.* at 50a-53a.[9] Significantly, the Government did not request or even suggest a remand for

[9] The Government erroneously asserted that the agency had not previously considered the "on account of" question. See Pet. App. 37a (finding that the Tchoukhrovs "suffer[ed] harm," and that "this harm was a result of the fact that the respondents are a member of the particular social group described above," but concluding that the harm "does not rise to the level of persecution"). Notably, the Government in its petition for certiorari has abandoned the request for a remand on the "on account of" issue.

consideration of changed country conditions or the possibility of relocation. Indeed, the Government did not suggest a remand for any issue other than the "on account of" requirement. *Id.* The Government also argued that any issues not briefed by Tchoukhrova to the Court of Appeals should be deemed abandoned and waived. *Id.* at 30 n.6 (citing *United States v. Tisor*, 96 F.3d 370, 376 (9th Cir. 1996) and *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991)).

The Court of Appeals granted the petition for review. Pet. App. 1a. In its ruling, the court agreed with most of the agency's analysis. In particular, the court "agree[d] with the legal conclusion of the immigration judge and the BIA that disabled children and their parents who provide care for them are members of 'a particular social group.'" *Id.* at 11a. The court also agreed with the agency's "factual findings that Evgueni and his parents were members of that social group, were harmed (directly or indirectly) on account of their membership, and that these harms were inflicted by the Russian government or those whom it was unwilling or unable to control." *Id.* And the court "agree[d] that, as a matter of law, the immigration judge was correct to look at the harms faced by the Tchoukhrovas collectively when evaluating Victoria's application." *Id.* The court disagreed on only one point: "[W]e hold that [the agency's] determination that the harms did not rise to the level of persecution is not supported by substantial evidence." *Id.*

In addressing Victoria's eligibility for asylum and entitlement to withholding, the Court of Appeals ruled that "the harms suffered by a disabled child" are harms that "[m]ay" be "taken into account when determining whether to grant his parent's asylum application." *Id.* at 16a. In so doing, the court simply "agree[d] with the approach taken by the agency." *Id.* The court also agreed with the approach taken by the agency's appellate counsel, who did not devote a single word of their panel brief to contesting the use of evidence of Evgueni's treatment as support for his mother's asylum application. See App.,

infra, at 42a-53a (arguing that Evgueni's treatment did not rise to the level of past or future persecution).

The Court of Appeals described the treatment that, taken cumulatively, "compel[led] the conclusion" that Victoria Tchoukhrova experienced persecution (Pet. App. 20a): Her newborn baby was "treated as [medical] waste and thrown into a pile of human remains." *Id.* He was then "confined against his parents' will" in an institution where the children were treated deplorably. *Id.* at 21a. Once her child was released from the institution, Victoria lived with him as he was denied "any treatment for his cerebral palsy" and any "elementary education." *Id.* at 23a. And her son "remains under constant threat that he will be returned to an *internaty* by the Russian government, as Russia confines both disabled children and adults in 'total institutions.'" *Id.* at 24a. Finally, "the Russian government was 'unwilling or unable'" to keep private individuals from physically assaulting Victoria's son because of his disability. *Id.* at 25a.

Having determined that Victoria had experienced persecution, the court recognized that it would ordinarily remand to permit "the agency to resolve, in the first instance, the question of a 'fundamental change in circumstances' or [whether] there is the possibility of relocation." *Id.* at 26a. But the Government had "made no argument to the agency – or to [the court] – that there has been a fundamental change in circumstances or a possibility of relocation." *Id.* Nor did any evidence to support such a claim appear in the record. *Id.* Accordingly, the court determined that "Victoria has established a well founded fear of persecution." *Id.* The court thus found Victoria eligible for asylum, and it remanded "for the Attorney General to exercise his discretion" with respect to her application. *Id.* The court similarly found Victoria entitled to withholding of removal, and it remanded for the grant of that relief. *Id.* at 27a.

The Government sought rehearing *en banc*. In its petition, the Government argued for the first time that

Evgueni's persecution should not have been considered in support of his mother's asylum application. See App., *infra*, at 13a-16a. It also argued for the first time that the court should remand for consideration of changed circumstances and the possibility of relocation – though the Government still offered no evidence or argument that changed circumstances or the possibility of relocation actually existed. *Id.* at 16a-17a. The court denied rehearing *en banc*. Pet. App. 41a.

REASONS FOR DENYING THE WRIT

The Government argues that the Court of Appeals contravened the principles of *INS v. Ventura*, 537 U.S. 12 (2002) (*per curiam*), and *Gonzales v. Thomas*, 126 S. Ct. 1613 (2006) (*per curiam*), in granting the Tchoukhrovs' petition for review. Indeed, it goes so far as to seek summary reversal, based on what it asserts is "a continuing pattern by the Ninth Circuit" of contravening those principles. Pet. 14. But the Government's objections are misplaced. Whether or not the Court of Appeals has properly taken account of the principles of *Ventura* and *Thomas* in *other* cases, it plainly followed those principles here. Far from creating a "new rule of immigration law" that mandates "reverse derivative asylum," Pet. 16, the Court of Appeals simply followed the agency decision under review in finding the harsh treatment of a minor child to be relevant to his mother's claim of persecution.

Indeed, in arguing that the Court of Appeals should not have considered Evgueni Tchoukhrov's treatment in evaluating his mother's asylum application, it is the Government who is disregarding the *Chenery I* principle on which *Ventura* and *Thomas* rest. See *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 92-95 (1943); see also *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 50 (1983) ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action."). It is the Government who seeks to disregard the decision the agency actually made.

Far from the kind of straightforward application of *Ventura* and *Thomas* that might warrant a summary reversal, what the Government seeks instead is a radical expansion of those *per curiam* decisions. Under the Government's interpretation, the Government can win an asylum case, but it can never lose. Instead, the reviewing court must always remand to give the Government another bite at the apple. If accepted, the Government's position would relegate reviewing courts in asylum cases to an essentially advisory role, in violation of basic principles of separation of powers. See *Hayburn's Case*, 2 U.S. 408, 2 Dall. 409, 410 n.* (1792). It would also disregard basic principles of waiver and forfeiture of arguments – principles to which the Government, no less than private parties, must adhere.

Stripped of the misleading *Ventura/Thomas* veneer, the Government's argument simply rests on a disagreement with the way the Court of Appeals applied settled law to the particular facts of this case. The agency determined that the treatment of the Tchoukhrovs constituted mere discrimination, rather than "persecution," and the Court of Appeals disagreed. The court's determination was correct. More to the point, however, it is precisely the kind of factbound ruling that is not a proper candidate for the grant of certiorari, much less a summary reversal. See S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

I. The Decision of the Court of Appeals Does Not Conflict with This Court's Rulings in *Ventura* and *Thomas*

The Government contends that the Court of Appeals violated the principles of *Ventura*, *supra*, and *Thomas*, *supra*, in two respects. First, it contends that the Court of Appeals "reached out to create a new rule of immigration law" – specifically, "a rule of reverse derivative asylum."

Pet. 16. It argues that *Ventura* and *Thomas* required the court to remand and permit the agency to decide whether to adopt such a rule. Second, the Government contends that *Ventura* and *Thomas* required the Court of Appeals to remand for a determination of changed circumstances or the possibility of relocation – even though the Government had *never*, at the agency stage or before the panel, argued that changed circumstances or the possibility of relocation existed. *Id.* at 18-20. Although the Government makes no assertion that the Court of Appeals' decision creates a conflict in the circuits, it contends that the decision is so egregiously erroneous as to warrant summary reversal. But the Court of Appeals committed no error here, much less an egregious one. Because the Government merely seeks error correction – and there is simply no error to correct – the *Ventura/Thomas* issue does not warrant this Court's review.

A. The Court of Appeals Created No "New Rule" of "Reverse Derivative Asylum"

1. Contrary to the Government's assertions (Pet. 16), the Court of Appeals neither "reached out" nor created "a new rule of immigration law." The Court of Appeals, expressly following the reasoning of the agency decision under review, simply held that "the harms suffered by a disabled child" are harms that "[m]ay" be "taken into account when determining whether to grant his parent's asylum application." Pet. App. 16a. That "common sense" ruling (*id.* at 17a), which accords with other circuit and agency decisions, created no hard-and-fast "rule of reverse derivative asylum." Cf. Pet. 21. Nothing in *Ventura* or *Thomas* required the Court of Appeals to remand before making it.

Ventura and *Thomas* presented a scenario that is far removed from this case. In both *Ventura* and *Thomas*, the Court of Appeals ruled on an issue that the agency itself had *never considered* in the decision under review. In *Ventura*, the Board of Immigration Appeals had ruled that

the asylum applicant failed to show "'that he face[d] persecution 'on account of' a qualifying ground.'" *Ventura*, 537 U.S. at 15. Although the Government had also argued that circumstances had changed "to the point where no realistic threat of persecution currently existed," *id.* at 13, the Board did not pass on that argument. When the Court of Appeals reversed the agency's "on account of" ruling, the court went on to consider and decide the changed-circumstances issue even though the Board did not decide it first. See *id.* at 15.

In *Thomas*, the Board ruled that the applicants were not eligible for asylum based on persecution on account of their race (and perhaps political opinion). *Thomas*, 126 S. Ct. at 1613-1614. On review, the *en banc* Court of Appeals held that the applicants *were* eligible for asylum – not based on their race or political opinion, but based on their membership in the "particular social group" of persons related to "Boss Ronnie," a notoriously racist and harsh foreman at a South African company. *Id.* at 1613-1614. But the Board had never had a chance to "consider[] whether Boss Ronnie's family presents the kind of 'kinship ties' that constitute a 'particular social group.'" *Id.* at 1615.

In both cases, this Court held that the Court of Appeals erred by deciding issues as a matter of first view, without giving the agency an opportunity to "make an initial determination" of those issues. *Ventura*, 537 U.S. at 17; *accord Thomas*, 126 S. Ct. at 1615. Applying the *Chenery I* doctrine that "a judicial judgment cannot be made to do service for an administrative judgment," *Chenery*, 318 U.S. at 88, this Court concluded that the Court of Appeals was required to remand to permit the agency "to address the matter in the first instance in light of its own expertise." *Ventura*, 537 U.S. at 17; see *Thomas*, 126 S. Ct. at 1615.

Unlike in *Ventura* and *Thomas*, the Court of Appeals here did not act before the agency made "an initial determination" of the relevance of a child's persecution to a

mother's asylum application. To the contrary, the Court of Appeals simply *affirmed* the agency's determination that such persecution *is* relevant. As we have shown above, virtually all of the evidence of Victoria's persecution presented at the hearing and discussed by the immigration judge involved the treatment of Evgueni. See pp. 8-9, *supra*. Yet he did not reject the asylum application on the ground that evidence of a son's barbaric treatment was irrelevant to a mother's claim of persecution – nor did agency counsel object to the relevance of that evidence. Indeed, the immigration judge explicitly relied on and evaluated that evidence. He rejected the application for the sole reason that the harsh treatment of Evgueni in Russia amounted only to "discrimination" and not to "persecution." See pp. 9-10, *supra*. And the Board, in its *Burbano* affirmance, did not merely agree with the result but instead adopted the immigration judge's ruling as its own. See pp. 10-11, *supra*. Although the Court of Appeals disagreed with the agency as to whether "persecution" existed, it simply followed the agency's own analysis of the relevance of a child's treatment to a mother's claim of persecution. Nothing in *Ventura* and *Thomas* requires a court to remand to the agency before *agreeing* with the agency's analysis of an issue.

Quoting one of the judges who dissented from the denial of rehearing below, the Government asserts that the immigration judge and the Board of Immigration Appeals would "surely be shocked at the suggestion" that they deemed Evgueni's treatment to be relevant to the question whether Victoria experienced persecution. Pet. 16 n.3 (quoting Pet. App. 51a) (internal quotation marks omitted). But that effort at mind-reading itself runs afoul of the *Chenery I* doctrine. As *Chenery* held, a court must "confin[e its] review to a judgment upon the validity of the grounds upon which the [agency] itself based its action." *Chenery*, 318 U.S. at 88. Here, the agency plainly did not base its judgment on the grounds the Solicitor General suggests – that Evgueni's treatment is irrelevant to Victoria's showing of persecution – but instead based its judgment on

the ground that the treatment amounted only to discrimination and not persecution. The agency consistently treated the evidence of Evgueni's treatment as relevant to Victoria's showing of persecution. The Solicitor General may wish that the agency had not done so, but *Ventura* and *Thomas* are not vehicles for opportunistic remands based on "too-late formulations, apparently coming from the Solicitor General's office." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 422 (1971) (separate opinion of Black, J.). Rather, those cases, and the *Chenery* doctrine they apply, enforce the principle that the agency's decision must stand or fall based on the agency's own analysis, and not that of counsel. The Court of Appeals followed that principle here.

The Government's arguments might be closer to the mark if the Court of Appeals had in fact created a "rule of reverse derivative asylum." Pet. 21. Under such a rule, all parents whose children experienced persecution would presumably be eligible for asylum on that basis alone, just as all children whose parents experience persecution are entitled to asylum under the derivative asylum regulation. See 8 C.F.R. § 207.7. But the Court of Appeals did not adopt such a rule. To the contrary, it merely determined (as did the agency) that a child's treatment is relevant to his mother's showing of persecution. Pet. App. 16a.

If there were any doubt on that score, the Ninth Circuit's subsequent *en banc* decision in *Abebe v. Gonzales*, 432 F.3d 1037 (9th Cir. 2005), should resolve it. The *Abebe* court, citing *Ventura*, determined that it could not decide the issue of reverse derivative asylum on its own and therefore remanded to the Board. See *id.* at 1043. *Abebe* shows that the Ninth Circuit has adopted no "rule of reverse derivative asylum." Pet. 16. Instead, consistent with *Ventura* and *Thomas*, it has allowed the agency to address in the first instance the relevance of a child's treatment to a parent's showing of persecution. And that is all the Court of Appeals did here.

2. Not only did the Court of Appeals comply with *Ventura* and *Thomas* when it deemed Evgueni's treatment relevant to his mother's showing of persecution; the court was also correct on the merits. To consider a child's treatment in determining whether his mother experienced persecution is, as the Court of Appeals said, simply "common sense." Pet. App. 17a. Family members personally suffer while watching their loved ones harmed.[10] The facts here illustrate the point. To have one's child taken away at birth, left in a bin of medical and abortion waste, and institutionalized against one's wishes in horrific conditions – and to secure his release only to be pressured to reinstitutionalize him – plainly inflicts harm on the parent as well as the child.

The Government asserts (Pet. 20) that the Court of Appeals' decision conflicts with the statute that confers derivative status on a spouse or child of a principal asylum applicant, 8 U.S.C. § 1158(b)(3), and the implementing regulation that states that parents do not get the same derivative treatment, 8 C.F.R. § 207.7(b)(6). There is no conflict. Derivative status under the statute and regulation is accorded automatically *regardless of any harm suffered* by the spouse or child and without regard to the nature or quality of the family relationship. In contrast, the Court of Appeals simply held that the harm to Evgueni as a disabled child – harm that plainly affects his mother in a direct way – was properly considered in adjudicating his mother's claim that she herself was persecuted. Throughout this litigation, Victoria's asylum claim has been based on the violence and severe discrimination faced by her son, her spouse, and herself on account of Evgueni's

[10] The Government's standard-form asylum application recognizes that common-sense point. Each question on that application regarding the basis for the asylum claim begins, "Have you or any member of your family . . . ," followed by requests for information regarding membership in organizations, mistreatment and threats, and arrests and imprisonment. See A.R. 195.

disability – as well as on her concern for her son's special need for a mother, a concern evidenced by her efforts to rescue and care for him. As we have shown, Victoria Tchoukhrova did not advance, nor did the court accept, any principle of automatic eligibility based on harm to one's child.

The Court of Appeals does not stand alone on this issue. Its unremarkable holding is shared by other courts and the Board of Immigration Appeals itself. For example, in *Abay v. Ashcroft*, 368 F.3d 634, 642 (6th Cir. 2004), the Sixth Circuit found a mother eligible for asylum "based on her fear that her daughter w[ould] be forced to undergo female genital mutilation." The court relied on the Board's earlier decision in *In re C-Y-Z-*, 21 I. & N. Dec. 915, 919-920 (B.I.A. 1997), which found that an alien whose spouse was subjected to forced sterilization was eligible for asylum. In *C-Y-Z-*, Board Member Rosenberg wrote a concurring opinion in which she cited an array of authority – including cases from the Board and the First and Ninth Circuits – recognizing that the treatment of the applicant's family members is relevant to the applicant's claim of asylum. *C-Y-Z-*, 21 I. & N. Dec. at 926-927 (Rosenberg, J., concurring). As the *Abay* court noted, numerous agency decisions both prior and subsequent to *C-Y-Z-* have granted relief to parents based on a threat that their children will experience female genital mutilation. See *Abay*, 368 F.3d at 641-642 (citing cases). The decision of the Court of Appeals here is perfectly in line with those decisions.[11]

[11] The Government asserts that the dilemma created for the Tchoukhrov family, the agency, and the courts when a child is eligible for asylum, but not his parents, can be resolved by a discretionary grant of deferred action. Pet. 21-22. But, of course, that option has been available to the Government at all stages of removal proceedings against the family; indeed, it could have exercised its prosecutorial discretion not to initiate removal proceedings against the family in the first place. Yet, the Government has never taken an approach other than seeking the whole family's deportation to Russia.

B. *Ventura* and *Thomas* Did Not Require a Remand on the Issues of Changed Circumstances and the Possibility of Relocation

As the decision below noted, "the INS made no argument to the agency – or to [the Court of Appeals] – that there has been a fundamental change in circumstances or a possibility of relocation." Pet. App. 26a. Although the Government's panel brief sought a *Ventura* remand on one issue, it was not the issue of changed circumstances or relocation. Instead, the Government sought a remand only on the question whether the Tchoukhrovs' harsh treatment was "on account of" their social group membership – an argument it abandoned in its petition for certiorari. See App., *infra*, at 50a-53a.[12] The Government has therefore waived the changed circumstances and relocation issues. In any event, neither *Ventura* nor *Thomas* required the Court of Appeals to remand to permit the agency to address them.

1. As the Government itself argued below, failure to present issues on appeal constitutes a waiver of those issues. See p.12, *supra*. That settled and fundamental principle applies not only to asylum applicants, but to the Government as well. "[I]t is no less good morals and good law that the Government should turn square corners in dealing with the people than that their people should turn square corners in dealing with the Government." *United States v. Winstar Corp.*, 518 U.S. 839, 886 n.31 (1996) (internal quotation marks omitted).

The Government suggests that it did not litigate the changed circumstances and relocation issues below because the immigration judge did not find past persecution

---

[12] The Government suggests that it *did* ask for a broad remand on "the remaining unaddressed issues to the Board." Pet. at 20. It did no such thing. It asked for a remand on one narrow issue. See App., *infra*, at 50a-53a. The Government's inaccurate suggestion to the contrary is disappointing.

– "so there was nothing to rebut." Pet. 19. That assertion presumes that the Government knew the eventual outcome of the case even before the parties finished litigating the merits. But at the time the Government presented its evidence, it obviously had no way of knowing how the immigration judge would ultimately rule.

Indeed, mid-hearing, the immigration judge stated that Evgueni's inability to attend public education "potentially rises to the level of persecution." A.R. 133. The immigration judge then gave the Government the opportunity to present any evidence it wanted. *Id.* at 160. Yet, despite the possibility of a past persecution finding, the Government presented no evidence on either changed conditions in Russia or possible internal relocation. Nor did it cross-examine Victoria on the two subjects. The Government's four-sentence brief to the Board similarly failed to address those issues. *Id.* at 17. The Government simply did not raise the changed circumstances and relocation issues before the agency at all.

Nor did the Government raise the issues before the Court of Appeals – at least not until it lost before the panel and filed its petition for rehearing. There is no excuse for the Government's failure to at least flag the issues as requiring a remand. The Government's suggestion that it did not raise the issues because the court had no authority to decide the "merits" of those issues in the first instance (Pet. 19) is a *non sequitur*. It is, of course, entirely possible to raise an issue and request a remand on the topic without litigating its "merits" on appeal. Indeed, that is exactly what the Government did in its petition for rehearing.

The Government presented no evidence or arguments on changed conditions or internal relocation to the immigration judge; made no arguments to the Board on those issues; failed to ask the Court of Appeals for a remand on those issues; and then raised them only after losing on appeal. The Government has waived the changed circumstances and relocation issues, and it may not raise them here. See *United States v. United Foods, Inc.*, 533 U.S.

405, 416-417 (2001) (refusing to consider Government's argument that was not properly presented to the Court of Appeals).

2. Even if the issue were properly before this Court, nothing in *Ventura* and *Thomas* required the Court of Appeals to remand on the changed circumstances and relocation issues. The Government asserts that the decision below reflects the "*exact same* legal error that prompted summary reversal in *Ventura* itself." Pet. at 19. But the Government ignores the fundamental differences between *Ventura* and this case.

Unlike here, the Government in *Ventura* explicitly argued the changed circumstances issue to the immigration judge. Cf. *Ventura*, 537 U.S. at 12. The Board ruled against the asylum applicant on different grounds and never reached the changed circumstances argument. See *id.* at 15. Before the Ninth Circuit, both sides noted that the Board had not considered the Government's alternative argument. See *id.* at 13. "And both sides asked that the Ninth Circuit remand the case to the BIA so that it might do so." *Id.* Instead, the Ninth Circuit "evaluated the Government's claim itself" and, based on a State Department report submitted five years earlier, held that the record evidence failed to rebut any presumption of persecution. *Id.* at 14.

Unlike *Ventura*'s fact-finding on appeal, the decision below declined to remand on the issue of changed country conditions for an entirely different reason – the Government's failure to litigate or even raise the issue before the agency. See Pet. App. 26a. Consistent with well-established principles of waiver, the Court of Appeals refused to permit the Government to belatedly raise new defenses for the first time on appeal: "when the INS makes no argument before the immigration judge or the BIA concerning changed conditions, we do not remand." Pet. App. at 26a. See also *Ghebremedhin v. Ashcroft*, 392 F.3d 241, 243 (7th Cir. 2004) (disagreeing "that *Ventura* stands for the broad proposition that a court of appeals must

remand a case for additional investigation or explanation once an error is identified" in *all cases*).

Nothing in *Ventura* suggests that a court must permit the Government to raise new defenses for the first time on appeal. Nor does *Thomas* require a remand here. In *Thomas*, the Court of Appeals held that the applicants' family constituted a "particular group" even though the applicants had not litigated that theory before the agency beyond simply checking the relevant box on their asylum application. See *Thomas*, 126 S. Ct. at 1613-1614; *Thomas v. Gonzales*, 409 F.3d 1177, 1191 (9th Cir. 2005) (*en banc*) (Rymer, J., dissenting), rev'd sub nom. *Gonzales v. Thomas*, 126 S. Ct. 1613 (2006). Because the agency did not rule on that theory, and the Government had never had a chance to respond to it at the agency level, this Court held that a remand was required. See *Thomas*, 126 S. Ct. at 1615.

Here, by contrast, the changed circumstances and relocation issues were always relevant to the case, and the Government had a chance to raise them throughout the administrative proceedings. Unlike in *Thomas*, the Court of Appeals here simply declined to have the Board consider a claim that the Government had waived by failing to assert it in a timely fashion before the agency. That refusal was in accord with well-settled administrative law principles. See *Woodford v. Ngo*, 126 S. Ct. 2378, 2385-2386 (2006) (citing cases applying general administrative law principle that issues must be raised before the agency in a timely manner).

3. By reading the *Chenery I* doctrine, as applied in *Ventura* and *Thomas*, to require a remand to permit it to present defenses that it failed to raise in the initial administrative proceedings or even before the panel of the Court of Appeals, the Government seeks a radical extension of that doctrine. Under its position, the Government can win an asylum case, but it can never lose – if the Court of Appeals rules against the agency, it must always remand to permit the Government to raise new issues and arguments

to justify its earlier decision. But this Court has held that "*Chenery* does not require that we convert judicial review of agency action into a ping-pong game." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969).[13]

Ventura and *Thomas* merely applied the *Chenery I* doctrine. They did not mandate that whenever a Court of Appeals considers the facts of a case and exercises its acknowledged power of judicial review, its holdings must be referred back for the agency's concurrence. That would contravene basic separation of powers principles. See *Hayburn's Case*, 2 U.S. 408, 2 Dall. 409, 410 n.*; see also *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-114 (1948) ("It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action."); *Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 512 (2004) (Kennedy, J., dissenting) ("The principle that judicial decisions cannot be reopened at the whim of the Executive or the Legislature is essential to preserving separation of powers and judicial independence."). *Ventura* and *Thomas* require that the agency have the first crack at the issues of a case. They do not give the agency veto power over the interpretive role of the judicial branch. *Ventura* and *Thomas* sought to preserve the separation of powers, not destroy it.

In short, as the Seventh Circuit has noted, see *Ghebremedhin*, 392 F.3d at 243-244, there is nothing in *Ventura* (or *Thomas*) that requires a Court of Appeals to remand to give the agency another bite at the apple as a matter of course whenever it finds an agency decision

---

[13] This Court has previously rejected a rule that would give applicants the power to generate "endless delay" by freely reopening asylum cases. *INS v. Abudu*, 485 U.S. 94, 108 (1988). The Government's reading of *Ventura* and *Thomas* would give the Government that same power.

erroneous. And there is certainly nothing in those cases that requires the Court of Appeals to remand to permit the Government to raise a claim that it passed up a prior opportunity to raise. The Court of Appeals' refusal to remand here therefore does not warrant this Court's review, much less summary reversal.

II. The Government's Challenge to the Court of Appeals' Persecution Determination Does Not Warrant Review

In two sentences, the Government challenges the Court of Appeals' conclusion that the record established not merely discrimination but "persecution." See Pet. 17. Although the Government suggests that the Court of Appeals violated *Ventura* and *Thomas* in deciding the persecution issue, there is no basis for such a suggestion. When it adopted the immigration judge's ruling as its own, see pp. 10-11, *supra*, the Board of Immigration Appeals plainly "ma[d]e an initial determination" of the persecution issue. *Ventura*, 537 U.S. at 17. The Court of Appeals merely exercised its acknowledged power to "determine whether [the agency's] decision exceeds the leeway that the law provides," *id.*

When the *Ventura/Thomas* veneer is stripped away, the Government's argument against the persecution holding appears as nothing more than a factbound challenge to the lower court's "substantial evidence" determination. In particular, the Government contends that the Court of Appeals "rel[ied] on unsubstantiated allegations in the record that the immigration judge did not rely upon" and "ignor[ed] other portions of the record in critical respects." Pet. 17 & nn.4-5. Such a narrow, fact-specific argument affords no basis for this Court's review, on summary reversal or otherwise. See S. Ct. R. 10.

In any event, the "persecution" determination of the Court of Appeals was entirely correct. The evidence that Victoria Tchoukhrova's son was disposed of as medical waste after his birth is not "unsubstantiated" (cf. Pet. 17 n.5); rather, it appears in a sworn affidavit that the immigration judge specifically declared to be part of the record. See n.1, *supra*. Nor was the evidence of the two violent attacks on Evgueni "unsubstantiated" (cf. Pet. 17 n.5). The immigration judge specifically found that those attacks occurred (Pet. App. 35a); he simply disagreed with the conclusion that they amounted to persecution. In evaluating the "record . . . as a whole," *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992), the Court of Appeals was not only entitled but obligated to consider those two pieces of evidence.

Nor did the Court of Appeals ignore evidence in the record. The court acknowledged the immigration judge's conclusion that Evgueni's deprivation of medical treatment and education was not so complete as to constitute persecution (cf. Pet. 17-18 n.5), but it simply disagreed with that conclusion, particularly when the evidence of medical treatment and education was considered in conjunction with the other ways in which Evgueni had been treated harshly in Russia. Pet. App. 23a-24a. And the Court of Appeals hardly ignored the record by referring to the hospital in which Evgueni was institutionalized as an "*internaty*." Cf. Pet. 18 n.5. The Human Rights Watch report, properly in the record, A.R. 252-292, documents similarly deplorable conditions in both *internaty* and "baby houses." Whatever name is used, the immigration judge explicitly found that the conditions at the "hospital" in which Evgueni was "confined" and "deprived of his parents" were "deplorable," with children "wet and dirty," "not properly fed," and some "crying in pain." Pet. App. 34a-35a.

As the Court of Appeals properly concluded, the record establishes a series of undisputed events that, when considered in their totality, establish that Victoria suffered not just discrimination, but persecution. Specifically, she (a) learned her newborn son was discarded as medical waste; (b) was barred from seeing her son for several days after his birth; (c) had her son taken to a government facility against her will and involuntarily held for months; (d) witnessed the squalid conditions in which her son spent the first months of his life; (e) was denied the right to enroll her son in public school; (f) watched as her son was ridiculed and subjected to violence that the authorities refused to investigate; (g) was spat upon herself when in public with her son; and (h) became a virtual prisoner in her own home due to the extreme societal and governmental prejudice against her disabled son. See pp.1-5, *supra*.

It is morally outrageous and legally flawed to suggest that a parent does not suffer harm so severe as to constitute persecution when her newborn child is taken against her will, institutionalized in squalor, and subjected to gross mistreatment and abuse. On the undisputed, compelling facts of this case, the Court of Appeals was clearly correct to conclude that the facts mandated a finding of persecution. Even if it were appropriate for this Court to address such a narrow, fact-specific issue, there would be no basis to review, much less reverse, the lower court's correct decision here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DICK THORNBURGH
JONATHAN M. YOUNG
KIRKPATRICK & LOCKHART
NICHOLSON GRAHAM LLP
1601 K Street, NW
Washington, DC 20006

SAMUEL R. BAGENSTOS
One Brookings Drive
Box 1120
St. Louis, MO 63130

DEBORAH ANKER
HARVARD IMMIGRATION
AND REFUGEE CLINIC
197 Friend Street
Boston, MA 02114

GREGORY R. NARON
SONNENSCHEIN NATH
& ROSENTHAL LLP
7800 Sears Tower
Chicago, IL 60606

JONATHAN D. MONTAG
Counsel of Record
MONTAG & NADALIN LLP
110 West C Street,
Suite 1809
San Diego, CA 92101
(619) 230-1420

LAURA A. WYTSMA
SONNENSCHEIN NATH &
ROSENTHAL LLP
601 S. Figueroa Street,
Suite 1500
Los Angeles, CA 90017

KAREN MUSALO
STEPHEN KNIGHT
CENTER FOR GENDER
& REFUGEE STUDIES
University of California
Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102

August 4, 2006

Corrected Copy
No. 03-71129

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTORIA TCHOUKHROVA, et al.,

Petitioners,

v.

ALBERTO R. GONZALES, Attorney General,

Respondent.

PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEALS

RESPONDENT'S PETITION FOR REHEARING EN BANC

PETER D. KEISLER
Assistant Attorney General

JONATHAN F. COHN
Deputy Assistant Attorney General

DONALD E. KEENER
Deputy Director

MARGARET PERRY
Senior Litigation Counsel
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 616-9310

TABLE OF CONTENTS

INTRODUCTION 1
STATEMENT 2
DISCUSSION 11
CONCLUSION 17
CERTIFICATE OF COMPLIANCE
CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

Ali v. Ashcroft,
394 F.3d 780 (9th Cir. 2005) 13

Barron v. Ashcroft,
358 F.3d 674 (9th Cir. Cir. 2004) 14

Chevron, U.S.A. Inc. v. Natural Resources Defense Council,
467 U.S. 837 (1984) 13

Farhoud v. INS,
122 F.3d 794 (9th Cir. 1997) 14

Fisher v. INS,
79 F.3d 966 (9th Cir. 1994) 12

Florida Power & Light Co. v. Lorian,
470 U.S. 729 (1985) 14

Gonzalez v. Reno,
212 F.3d 1338 (11th Cir. 2000) 3

INS v. Aguirre-Aguirre,
435 [sic] 414 (1999) 13

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 13

INS v. Ventura,
537 U.S. 12 (2002) 1,13,15,16

Kaiser v. Ashcroft,
390 F.3d 653 (9th Cir. 2004) 13

Maini v. INS,
212 F.3d 1167 (9th Cir. 2000) 13

Ochave v. INS,
254 F.3d 859 (th [sic] Cir. 2001) 12

Polovchak v. Meese,
774 F.3d 731 (7th Cir. 1985) 3

Prasad v. INS,
47 F.3d 336 (9th Cir. 1995) 13

SEC v. Chenery Corp.
318 U.S. 80 (1943) 13

Singh v. INS,
94 F.3d 1353 (9th Cir. 1996) 13

Tchoukhrova v. Gonzales,
404 F.3d 1181 (9th Cir. 2005) ..... 8, *passim*

Yang v. INS,
79 F.3d 932 (9th Cir.).,
cert. denied 222 US 222, (1996) 12

Zara v. Ashcroft,
383 F.3d 927 (9th Cir. 2004) 14

STATUTES

The Immigration and Nationality Act of 1952, as amended:

Section 101(a)(42)(A),
8 U.S.C. § 1101(a)(42)(A) 2

Section 103(a)(3),
8 U.S.C. § 1103(g)(2) 13

Section 208(b)(1),
8 U.S.C. § 1158(b)(1) 2, 3, 13

Section 208(d)(1),
8 U.S.C. § 1158(d)(1) 13

Section 241(b)(3),
8 U.S.C. § 1231(b)(3) 3

Section 242(d)(1),
8 U.S.C. § 1252(d)(1) 14

REGULATIONS

8 C.F.R. § 1208.13(a) 2, 11, 15

8 C.F.R. § 1208.13(b) 2, 11, 15

8 C.F.R. § 1208.16(b) 3, 5, 11

8 C.F.R. § 1208.21(a)-(g) 3, 11

INTRODUCTION

Creating an irreconcilable conflict with circuit and Supreme Court precedent, contravening numerous statutes and regulations, violating fundamental principles of separation of powers, and disregarding the most basic precepts of administrative law, a panel of this Court issued a ground-breaking decision that invented a brand-new form of immigration relief. According to the panel,

someone who has never been persecuted before and faces no fear of future persecution can nonetheless obtain asylum through actions taken solely against the applicant's offspring. This decision finds no support in the text of the statute, the decisions of the Board of Immigration Appeals, or the jurisprudence of any court of appeals. What is more, the issue was not even raised by the parties, but only by the panel *sua sponte*, with no exhaustion of remedies, no prior agency decision, and no briefing on the question. Accordingly, the Attorney General respectfully requests rehearing *en banc*.

The decision warrants *en banc* review for several reasons. First, the panel's newfangled means of obtaining asylum which the panel refers to as "reverse-derivative" asylum, is contrary to the relevant statues and regulations and is [sic] tension with decisions of this Court. Second, by considering unexhausted claims, the decision is in direct conflict with circuit precedent and the plain text of the Immigration and Nationality Act, both of which prohibit jurisdiction over unexhausted questions raised for the first time on review. Third, the opinion repeatedly violates the Supreme Court's decision in *INS v. Ventura,* 537 U.S. 12 (2002), which prohibits the Court from reaching asylum questions that were not decided by the agency in the first instance. Finally, the panel's decision presents a question of exceptional importance, because it has the potential to affect the outcome of a large number of asylum cases and raises sensitive questions of the relationship between the judicial power of review and the Executive Branch's duty to implement the law.

STATEMENT

1. Asylum is discretionary relief that is available if "the Attorney General determines" that an alien is a "refugee," 8 U.S.C. § 1158(b)(1), *i.e.*, is someone who is unable or unwilling to return to her country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion." 8 U.S.C. § 1101(a)(42)(A). Regulations direct that "the applicant" must prove that "*he or she* has suffered past persecution" or "*he or she* has a well-founded fear of future persecution," 8 C.F.R. §§ 1208.13(a), (b) (emphasis added). These regulations codify a core principle of our asylum law – that asylum is for persecution of the "applicant," not someone else. "[H]e or she" must have suffered the past persecution or fear future persecution.

Moreover, although a separate statutory provision permits particular family members to derive asylum from a relative's claim, this provision is expressly limited to cover only a "spouse" or "child" of an alien who has been granted asylum. 8 U.S.C. § 1158(b)(3); *see also* 8 C.F.R. §§ 1208.21(a)-(g). No one else can derive asylum from the principal applicant. 8 U.S.C. § 1158(b)(3). Thus, a parent can accord derivative asylum to a minor child, but not the reverse.[1]

---

[1] A child may apply for asylum in his own right, *see Gonzalez v. Reno*, 212 F.3d 1338, 1248-50 (11th Cir. 2000), depending on various considerations such the child's age, whether he is accompanied or alone, and whether his parents support or oppose the application. *Id.*; *Polovchak v. Meese*, 774 F.3d 731 (7th Cir. 1985).

Likewise, mandatory withholding of removal is available if "the Attorney General determines" that an "alien's life or freedom would be threatened . . . because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3). Again, numerous regulations require "the applicant" to prove "his or her life or freedom would be threatened," that is, "it is more likely than not" that "he or she would be persecuted" in the future. 8 C.F.R. §§ 1208.16(b); (b)(2). There is no statute or regulation authorizing derivative withholding of removal.

2. Victoria Tchoukhrova ("Tchoukhrova") is a female native of Russia who has a child with cerebral palsy. In 2001, she applied for asylum and withholding of removal asserting persecution on account of her "political opinion" (opposing treatment of disabled persons in Russia) and "membership in a particular social group" ("women involved in organized protest against human rights/children rights violations" or "[p]arents of children born with severe disabilities"). AR 180-81, 191-204. Her reasons for seeking asylum, though understandable for a caring mother, were unquestionably insufficient under our asylum laws. In her asylum application, she admitted that she did not fear "organized persecution," but rather "continuous discrimination and abuse." And she candidly conceded that she wanted asylum so her son could get "continuous treatment" from an osteopath in San Diego and so he could attend a public school with a special physical education instructor, speech teacher, and equipment. AR 328-33.

Tchoukhrova testified that in 1991 her son Evgueni was born with cerebral palsy due to a "trauma of the spin[al] cord." Because of the condition, medical personnel told Tchoukhrova that he was not likely to survive, and

her baby was transferred to a "government hospital" without her consent. She conceded that, at the hospital, "he had been treated," but was "pretty sure he was isolated." She could not visit him for two months. AR 92-93, 95, 97.

Fortunately, her child did survive, but at age one, he was diagnosed with cerebral palsy. To obtain medical care for him, Tchoukhrova visited a San Diego osteopath three times between 1994 and 1995. AR 100, 104, 144-46, 202-03, 332-33. After that, however, Tchoukhrova could not get Russia to pay for return visits to San Diego. In 2000, she liquidated her assets, moved to San Diego, and applied for asylum. AR 118, 332-33.

It is important to note that, in Russia, despite the government's meager resources to assist disabled persons, AR 242, Tchoukhrova's child had his own "personal [government] pediatrician" and received hospitalization with adequate treatment and medicines. AR 100, 104, 110-11, 113, 120. Tchoukhrova nonetheless felt that Russian medical care was substandard because her son "lack[ed] . . . the therapy that normal kids can have" and was not "treated normally and according[] to his conditions."[2] AR

[2] A 2000 State Department Report incorporated a Human Rights Watch report on conditions in "Russian [o]rphanages." AR 242, 256-79. The reports shows there are over 600,000 "abandoned children" (called "social orphans") whose parents have "abandoned" them to be raised by the state because of social problems like poverty, joblessness, illness, or because children are disabled. One third (200,000) of these "orphans" or "social orphans" live in "orphanages." AR 254, 265. Placement depends on a state diagnosis of "orphans" at age four. There are orphanages for educable "[n]ormal" orphans; educable mildly retarded orphans ("oligophrenic debil"); and a "psychoneurological internaty" for uneducable, severely retarded orphans ("imbetsile" or "idiot") aged 5 to 17, who are transferred to adult "internaty" at the age of 18, with a life of

(Continued on following page)

113. Because of the child's cerebral palsy, he was not admitted to "regular school," and instead was "offere[d] home studies with a visiting teacher." AR 103, 333. He also encountered some discrimination. "Because the public . . . [did not] see [handicapped] kids very often, they [did not] understand how to react to the child." AR 103. Some parents told their children not to play with the son, and in 1997 a woman "pushed" him because he touched her laundry. The boy fell, cut his scalp, and needed stitches. That same year, three "young lads" ran with the boy and "dropped him on the ground," which broke his arm, caused a concussion, and required hospitalization for two months. AR 119-20, 127.

Significantly, Tchoukhrova did not testify of many adverse experiences of her own. She said that she joined the Moon Society, and once a crowd threw rocks at her car as she left a society meeting. And in 1997, her husband was laid-off from work and was advised there could be problems if he stayed "in this society." AR 116-18.

3. Accordingly, the IJ denied Tchoukhrova asylum and withholding of removal. The IJ correctly stated that the application was Tchoukhrova's, with her spouse and child "dependent upon that application." AR 52-53. And the IJ found that "the harm suffered by [Tchoukhrova] did not rise to the level of persecution." AR 59. The inability to

---

"total institution." AR 258, 266-68. Five percent (30,000) of Russia's orphans are in these "internaty." "Orphan care varies broadly across Russia, making it very difficult to draw conclusions about cities, regions, or even classes of institutions," AR 268, but there were reports of serious abuses in some "internaty." AR 267-68. The Government has "meager resources" to assist disabled persons; it gives priority to disabled World War II and other veterans. AR 242.

"get the quality of medical treatment available in the United States was not persecution," AR 59, and the restriction on attending public school was simply due to "Russia'[s] . . . dire economic straits" and "[in]sufficient resources to provide adequate schooling for handicapped children." AR 60-61. Further, the IJ did not credit Tchoukhrova's testimony that her son was "refused" medical care." The IJ found that the testimony was "exaggerated" and "not true." AR 54, 57, 110-11. Finally, the IJ found that although there is "substantial discrimination against individuals with disabilities," "discrimination does not rise to the level of persecution." AR 61. Thus, the IJ concluded that Tchoukhrova failed to establish either past persecution or a well-founded fear of future persecution. AR 59-61.

The Board of Immigration Appeals ("BIA") dismissed Tchoukhrova's appeal. The BIA concluded that, while there was a "sympathetic family history," the "lead respondent [Tchoukhrova]" did not adequately demonstrate that "she was a victim of past persecution" or "she has a well-founded fear or faces a clear probability of . . . persecution in her country." AR 10.

4. At oral argument, the panel (*Reinhardt,* Tashima, Wardlaw) questioned who should be treated as the asylum applicant. After Tchoukhrova's counsel described the derivative-asylum scheme which permits a child to derive asylum from a parent but not vice versa, the panel suggested that the law needed some type of "reverse-derivative" asylum from the child to the parents. The panel also noted that, if the law were ambiguous, the Court could clear it up.

Subsequently, the panel issued a published decision reversing the denial of relief and ruling that Tchoukhrova

was eligible for asylum and withholding of removal based on her son's persecution, even if she were not independently eligible for relief in her own right. 404 F.3d 1190-92, 1194-95. The panel did so by "imputing the disabled child's harms to the parent filing an application for asylum on behalf of the family members." *Id.* at 1190. In effect, the panel created the "reverse-derivative" asylum it had suggested at oral argument, with asylum running from a child to a parent. *Id.* The panel raised this issue as a "threshold procedural question," acknowledging the question was not "expressly" "discuss[ed]" by the agency. *Id.* at 1190.

According to the panel, it was taking a "pragmatic approach," which enabled it to ignore the law's distinctions between principal and derivative asylum. *Id.* at 1192. Attempting to justify this atextual approach, the panel stated that caring for families is a purpose underlying our immigration laws and that enforcing the law as written would be "cruel" as applied to disabled children and their parents. *Id.* At [sic] 1190-92. Additionally, the panel cited to four Ninth Circuit decisions in the past ten years that had not "formalistically divided the claims between 'principal' and 'derivative' applicants but instead, without discussion, have simply viewed the family as a whole." *Id.* at 1192. Thus, the panel determined that "a parent of a disabled child may file as a principal applicant . . . and may establish her asylum claim on the basis of the persecution inflicted or feared by the [derivative] child." *Id.* The panel then proceeded to find that the record "compel[led]" the conclusion that the son experienced cumulative "harms" constituting persecution, based in part on de novo fact-finding, and conclusions that have no basis in the record.

Specifically, the panel alluded to: (1) an "attempted disposal of the newborn child as medical waste," being "discarded along with aborted fetuses" at birth;[3] (2) his two month "involuntary confinement" as a newborn in an "internaty" depriving him of his "right to be free;"[4] (3) "the state's refusal to provide [the child] with an elementary or other education" and "the government's refusal to provide medical care,"[5] (4) the child "remains under the constant threat that he will be returned to an internaty by the Russian government;"[6] and (5) "violence on the part of individual citizens" which "the immigration judge failed to even mention" (the IJ found there were two incidents but held there was no persecution). *Id.* at 1192-95.

The panel then concluded that Tchoukhrova was persecuted in the past by imputation from the boy, and this triggered the presumption that Tchoukhrova had a well-founded fear of future persecution. *Id.* at 1195-96.

---

[3] This was de novo factfinding and an unexhausted claim. It was asserted once, in one of two asylum declarations and never mentioned again. AR 201. There was no testimony or finding to this effect, and no claim of error or appeal objecting to lack of such a finding.

[4] This misportrays the record. The IJ found, and Tchoukhrova testified, that this was a "hospital." AR 56, 95. The undisputed documentary evidence was that an "internaty" is an orphanage for "abandoned" "orphans" from 5 to 17 years old who have been diagnosed as "uneducable" because of severe mental impairment. AR 258, 267.

[5] This misportrays the record. It was undisputed that Russia provided home schooling with a visiting teacher. AR 333. The IJ found there was no denial or refusal of medical care. AR 54, 57, 110-111. Tchoukhrova got medical care for the child. She simply disagreed with it and thought it was substandard. AR 100, 104, 110-113, 120.

[6] This misportrays the record. The panels' "risk" of future "internaty" confinement is contrary to the evidence that the son is not a "abandoned," not an "orphan," not diagnosed as severely retarded or ineducable – which are the persons in "internaty." AR 258, 267.

Although the issue was never presented to the BIA, the panel proceeded to find, de novo, that the presumption of future persecution was not rebutted. Consequently, the panel held that Tchoukhrova was eligible for asylum and withholding of removal, and that her spouse and son could derive such relief as well. *Id.* at 1195-96.

DISCUSSION

This decision warrants *en banc* review for several reasons.

1. First, the panel has invented a whole new theory of asylum eligibility running from child to parent. Under this theory, a person can be eligible for asylum without enduring past persecution or having a risk of actual future persecution. By contrast, under asylum and withholding regulations, Tchoukhrova had to prove that "she has suffered past persecution," or "she [sic] has "a well-founded fear of future persecution," in order to qualify for asylum. 8 C.F.R. §§ 1208.13(a), (b). Moreover, while under the derivative scheme a "child" may derive asylum from a principal parent, the child's status is expressly dependent on "principal alien's" status. 8 C.F.R. §§ 1208.21(a)-(g). This means that the child stands in the shoes of the parent; his application rises or falls on the parent's. Contrary to this scheme, instead of looking at the persecution of Tchoukhrova, who was the asylum applicant, the panel treated the dependent son's derivative claim as controlling, and looked to his harm concluding that he had been persecuted. 404 F.3d at 1192-95. The panel then imputed the derivative child's harm to Tchoukhrova, and concluded that this made her eligible for asylum, without having to establish that she, herself, suffered past persecution or has a well-founded

fear or clear probability of persecution, contrary to our law. 1192, 1195-96. The panel thus reversed the operation of our derivative laws, in effect having the derivative child's claim control the principal parent's claim, and then permitted Tchoukhrova to be eligible without any persecution of herself, violating the principal applicant scheme.

The panel's violation of the principal and derivative asylum schemes, and invention of this new theory of asylum eligibility, creates a conflict with case law in this Circuit applying the law as written. This court has held that when a derivative child's application is part of a family unit's, the resolution of the parent's application will govern that of the minor child, not the reverse as the panel has decided. *See Yang v. INS*, 79 F.3d 932, 933 (9th Cir.)., *cert. denied* 222 US 222, (1996); *Fisher v. INS*, 79 F.3d 966 (9th Cir. 1994) (en banc) (where son's asylum status derives from mother's application, court "will focus on the status of [the mother]"). *Cf. Ochave v. INS*, 254 F.3d 859, 864 (th [sic] Cir. 2001) (derivative claims "stand or fall" on principal's claim). The cases the panel cited in support of its invented position actually show a conflict with its position, since in accordance with the law as written, in these cases the parent or spouse established a persecution claim in his or her own right from which the other family members could lawfully derive asylum. *Kaiser v. Ashcroft*, 390 F.3d 653 (9th Cir. 2004); *Maini v. INS*, 212 F.3d 1167 (9th Cir. 2000); *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996); *Prasad v. INS*, 47 F.3d 336, 339 (9th Cir. 1995). Moreover, the panel's decision conflicts with circuit case law recognizing that there is no derivative withholding of removal. *Ali v. Ashcroft*, 394 F.3d 780, 782 n. 1 (9th Cir. 2005).

2. Rehearing *en banc* is also warranted because the panel's decision is in direct conflict with case law of this

Circuit and the Supreme Court's decision in *Ventura*. The basic legal principles are clear. Congress has delegated to the Executive Branch the authority to establish, within reasonable bounds, the requirements for asylum and to decide whether it is to be granted. 8 U.S.C. §§ 1158(a), (b)(1), (d)(1). The Attorney General has established legal standards for asylum eligibility by means of case-by-case adjudication, *see INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), and by regulations. 8 U.S.C. §§ 1103(a)(3), 1158(b)(1), (d)(1). Both are entitled to *Chevron* deference. *INS v. Aguirre-Aguirre*, 435 415, 414 (1999). *See Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 845 (1984). "In such circumstances a 'judicial judgment cannot be made to do service for an administrative judgment'." *Ventura*, 511 U.S. at 17 (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943)). The Court is not "empowered to conduct a de novo inquiry . . . and reach its own conclusions." *Id.* (quoting *Florida Power & Light Co. v. Lorian*, 470 U.S. 729, 744 (1985).

a. Protecting the Executive Branch's authority, Congress has prohibited courts from reviewing unexhausted questions not raised before the agency. 8 U.S.C. § 1252(d)(1) ("[A] court may review a final order of removal only if . . . the alien has exhausted administrative remedies available to the alien as of right."). The exhaustion requirement ensures that the Executive Branch has the opportunity to resolve questions before judicial intervention. *See Zara v. Ashcroft*, 383 F.3d 927, 931 (9th Cir. 2004). Under this circuit's case law the Court has no jurisdiction to decide unexhausted questions raised for the first time on review. *Barron v. Ashcroft*, 358 F.3d 674, 677 (9th Cir. Cir. 2004); *Zara*, 383 F.3d at 931. In order to exhaust remedies a claim must have been raised before

the BIA. *Zara*, 383 F.3d at 931; *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997).

The panel's decision is in conflict with this case law. Here, the panel reversed the agency's denial of relief based on a new "threshold" question that the panel raised for the first time on review about whether to impute Tchoukhrova to be eligible based solely on persecution of her child. Tchoukhrova never raised such a claim before the agency. This is a new, unexhausted question raised by the panel for the first time on review. Thus, the panel's decision is in direct conflict with the case law of this circuit precluding determination of unexhausted questions.

b. The panel's decision also conflicts with the Supreme Court's decision in *Ventura*. 537 U.S. at 15-17, not once but three times. First, the panel concedes that the agency did not "expressly" "discuss[]" the new "threshold" question whether Tchoukhrova would be imputed to be eligible for asylum based solely on persecution of her child. 404 F.3d at 1190-91. And the suggestion that the agency took the same "pragmatic approach," *id.* at 1192, is a "hollow reed." At no point in the IJ's or BIA's decisions do they take the panel's invented approach that Tchoukhrova was (or would be) reversely eligible for asylum solely by imputation from her derivative son – without establishing that she was persecuted in the past or faces future persecution. The Court's violation of *Ventura* is serious and far-reaching. It pertains to a question of statutory construction as to the meaning of our principal and derivative asylum laws affecting all cases, not just Tchoukhrova's.

Second, after engaging in de novo factfinding, the panel should have remanded to the agency for it [sic] consider whether these facts amounted to persecution. Third, under

the regulations, a finding of past persecution only gives rise to a presumption of a well-founded fear or clear probability of future persecution, which the government can then rebut by showing changed personal or country circumstances, or "the applicant" could relocate elsewhere. 8 C.F.R. §§ 1208.13(b)(1)(A) and (B); 1208.16(b)(1). After finding that Tchoukhrova sustained past persecution, the panel should have remanded to the BIA for a determination of whether the government rebutted, or could rebut, the presumption. *Ventura*, 537 U.S. at 15-17. The panel refused to do this and reached the issue deciding it in the first instance. To correct these errors, the Court should grant rehearing en banc.

3. Finally, rehearing en banc is warranted because this case presents a questions [sic] of exceptional importance. Over the years asylum and withholding of removal have taken on increasing prominence in our immigration system. In 1984 there were 11,000 asylum applications filed with the Executive Office of Immigration Review (which is the agency for the BIA and IJ's). As of March 1998, there were nearly 33,800 asylum and withholding of deportation cases pending at EOIR. In the last two years, EOIR has had between 60,000 and 80,000 applications. The invention of a new form of asylum and withholding eligibility – changing the fundamental operation of the principal and derivative laws – therefore presents an important issue in the ongoing administration of our Nation's immigration laws. In addition, the panel's decision raises serious questions about the fundamental relationship between the court's power of review and the Executive Branch's congressionally mandated duty to administer the statutory scheme. And this decision enters

into the sensitive areas of the political relationship between the United States and a foreign sovereign.

CONCLUSION

For the foregoing Respondent requests that the Court grant its petition for rehearing *en banc*.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

JONATHAN F. COHN
Deputy Assistant Attorney General

DONALD E. KEENER
Deputy Director
/s/ Margaret Perry
MARGARET PERRY
Senior Litigation Counsel
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 616-9310

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-1 or 40-1, the attached petition for rehearing en banc is:

X Proportionally spaced, has a typeface of 14 points or more, and contains 3856 words (petitions and answers must not exceed 4,200 words).

/s/ Margaret Perry
Margaret Perry
Senior Litigation Counsel

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2005, two copies of the foregoing **Corrected Copy of Respondent's Petition For Rehearing En Banc** were served on Petitioner's counsel by first class mail, postage prepaid, by depositing them in the Department of Justice mail system for same day mailing, addressed to:

Jonathan D. Montag

Law Offices of Jonathan D. Montag

P.O. Box 124801

San Diego, CA 92112

/s/ Margaret Perry
Margaret Perry
Assistant United States Attorney

NO. 03-71129

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTORIA TCHOUKHROVA, ET AL.,

A75 772 599, 600, 601

Petitioners,

v.

JOHN ASHCROFT, ATTORNEY GENERAL,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

PETER D. KEISLER
Assistant Attorney General
Civil Division

MARGARET J. PERRY
Senior Litigation Counsel

WILLIAM C. ERB, JR.
Attorney
Office of Immigration Litigation
Civil Division, Department of Justice
P.O. Box 878
Ben Franklin Station
Washington, D.C. 20044
(202) 616-4869

Attorneys for Respondent

TABLE OF CONTENTS

STATEMENT OF JURISDICTION 1

ISSUES PRESENTED 3

STATEMENT OF THE CASE 4

STATEMENT OF THE FACTS 5

A. Proceedings Before the Immigration Court 5

B. The Decision of the Immigration Judge ... 6

C. The Decision of the Board of Immigration Appeals 11

SUMMARY OF THE ARGUMENT 11

ARGUMENT 12

I. SUBSTANTIAL EVIDENCE SUPPORTS THE IMMIGRATION JUDGE'S FINDING THAT PETITIONERS WERE NOT PERSECUTED IN THE PAST, OR HAVE A WELL-FOUNDED FEAR OF FUTURE PERSECUTION IN RUSSIA 12

A. Statutory Standard and Burden of Proof ... 12

B. Standard of Review 15

C. Substantial Evidence Supports The Immigration Judge's Finding That The Conduct Petitioners Experienced In The Past Did Not Amount to Persecution 17

D. Substantial Evidence Supports the Immigration Judge's Determination That the Petitioners Failed to Show a Well-founded Fear of Future Persecution in Russia 26

II. PETITIONERS FAILED TO MEET THEIR BURDEN OF ESTABLISHING WITHHOLDING OF REMOVAL 31

CONCLUSION 32

STATEMENT OF RELATED CASES

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

Abedini v. INS,
971 F.2d 188 (9th Cir. 1992) 15, 16

Adebisi v. INS,
952 F.2d 910 (9th Cir. 1992) 25

Al-Harbi v. INS,
242 F.3d 882 (9th Cir. 2000) 14, 15

Alaelua v. INS,
45 F.2d 1379 (9th Cir. 1995) 17

Aragon-Ayon v. INS,
206 F.3d 847 (9th Cir. 2000) 3

Aruta v. INS,
80 F.3d 1389 (9th Cir. 1996) 16

Baballah v. Ashcroft,
335 F.3d 981 (9th Cir. 2003) 23

Berroteran-Melendez v. INS,
955 F.2d 1251 (9th Cir. 1992) 14

Brijmati Singh v. INS,
134 F.3d 962 (9th Cir. 1997) 21

Bucur v. INS,
109 F.3d 399 (7th Cir. 1997) 19, 26

Castillo v. INS,
951 F.2d 1117 (9th Cir. 1991) 15

De Valle v. INS,
901 F.2d 787 (9th Cir. 1990) 15, 16, 31

Duarte de Guinac v. INS,
179 F.3d 1156 (9th Cir. 1999) 18

Elnager v. INS,
930 F.2d 784 (9th Cir. 1991) 17

Farhoud v. INS,
122 F.3d 794 (9th Cir. 1997) 5

Fatin v. INS,
12 F.3d 1233 (3rd Cir. 1993) 18, 19, 26

Fisher v. INS,
79 F.3d 955 (9th Cir. 1996) 15, 18, 19

Florida Power & Light Co. v. Lorian,
470 U.S. 729 (1985) 29

Ghaly v. INS,
58 F.3d 1425 (9th Cir. 1995) ..... 17, *passim*

Grava v. INS,
205 F.3d 1177 (9th Cir. 2000) 21

INS v. Aguirre-Aguirre,
119 S. Ct. 1439 (1999) 16

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 31

INS v. Chen,
326 F.3d 1316 (9th Cir. 2003) 30

INS v. Elias-Zacarias,
502 U.S. 478 (1992) 15, 16

INS v. Stevic,
467 U.S. 407 (1984) 15

INS v. Ventura,
123 S. Ct. 353 (2002) 28, 29, 30

Kazlauskas v. INS,
46 F.3d 902 (9th Cir. 1995) 13

Korablina v. INS,
158 F.3d 1038 (9th Cir. 1998) 20

Kovac v. INS,
407 F.2d 102 (9th Cir. 1969) 18, 23

Lim v. INS,
224 F.3d 929 (9th Cir. 1999) 25

Marquez v. INS,
105 F.3d 374 (7th Cir. 1997) 19

Martinez v. Ylst,
951 F.2d 1153 (9th Cir. 1991) 5

McMullen v. INS,
658 F.3d 1312 (9th Cir. 1981) 25

Mikhailevitch v. INS,
146 F.3d 384 (6th Cir. 1998) 20

Molina-Estrada v. INA [sic],
293 F.3d 1089 (9th Cir. 2002) 14

Nagoulko v. INS,
333 F.3d 1012 (9th Cir. 2003) 23

Port of Portland v. United States,
408 U.S. 811 (1972) 29

Prasad v. INS,
47 F.3d 336 (9th Cir. 1995) 16, 19, 22

Rodas-Mendoza v. INS,
246 F.3d 1237 (9th Cir. 2001) 21

Rodriguez-Rivera v. INS,
848 F.2d 998 (9th Cir. 1988) 14

SEC v. Chenery Corp.,
318 U.S. 80 (1943) 29

Saballo-Cortez v. INS,
761 F.2d 1259 (9th Cir. 1985) 23

Sangha v. INS,
103 F.3d 1482 (9th Cir. 1997) 15, 16, 21

Singh v. INS,
292 F.3d 1017 (9th Cir. 2002) 30

Sotelo-Aquije v. Sattery,
17 F.3d 33 (2d Cir. 1994) 25

Turcios v. INS,
821 F.2d 1396 (9th Cir. 1987) 15

United States v. Tisor,
96 F.3d 370 (9th Cir. 1996) 5

Vargas v [sic] *INS*,
821 F.2d 906 (9th Cir. 1987) 5

Vides-Vides v. INS,
783 F.2d 1463 (9th Cir. 1986) 15

ADMINISTRATIVE DECISIONS

In re Chen,
20 I. & N. Dec. 16 (BIA 1989) 13

In re Mogharrabi,
19 I. & N. Dec. 439 (BIA 1987) 13

Matter of Acosta,
19 I. & N. Dec. 211 (BIA 1985) 18

Matter of Burbano,
20 I. & N. Dec. 872 (BIA 1994) 11, 17

Matter of Laipenieks,
18 I. & N. Dec. 433 (BIA 1983) *rev'd on other grounds*, 750 F.2d 1427 (9th Cir. 1985) 25

Matter of O-Z- and I-Z-,
22 I. & N. Dec. 23 (BIA 1998) 20

Matter of S-A-, Int. Dec. 3433,
___ I. & N. Dec. ___, 2000 WL 827754 (BIA 2000) 18

STATUTES

The Immigration and Nationality Act of 1952, as amended:

Section 101(a) (42) of the INA,
8 U.S.C. § 1101(a)(42) 12, 18

Section 208(a) of the INA,
8 U.S.C. § 1158(a) 2, 12

Section 237(a)(1)(B) of the INA,
8 U.S.C. § 1227(a)(1)(B) (2000) 1, 4

Section 241(b)(3) of the INA,
8 U.S.C. § 1231(b)(3) 2, 31

Section 241(b)(3)(A) of the INA,
8 U.S.C. § 1231(b)(3)(A) 14

Section 242(a) of the INA,
8 U.S.C. § 1252(a) 3

Section 242(b)(1) of the INA,
8 U.S.C. § 1252(b)(1) 3

Section 242(d)(1) of the INA,
8 U.S.C. §1252(d)(1) 5

REGULATIONS

8 C.F.R. § 208.13(a) (1996) 15

8 C.F.R. § 208.13(b)(1) (1998) 13, 18

8 C.F.R. § 208.13(b)(2) (1998) 14, 18

8 C.F.R. § 208.16 (2002) 2

8 C.F.R. § 208.16(b) (1996) 15

8 C.F.R. § 208.18 (2002) 2

8 C.F.R. § 242.17(c)(4)(iii) (1996) 15

8 C.F.R. § 1003.1(b)(3) (2003) 2

MISCELLANEOUS

Homeland Security Act of 2002, Pub. L. No. 107-296, 110 Stat. 2135 (Nov. 25, 2002) 2

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39 U.N. GAOR Supp. (No. 51 at 197, U.N. Doc. A/39/51 (1984)], *entered into force* 2

No. 03-71129

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTORIA TCHOUKHROVA, ET AL.,
A75-772-599, 600, 601,

Petitioners,

v.

JOHN ASHCROFT, Attorney General,

Respondent.

BRIEF FOR RESPONDENT

STATEMENT OF JURISDICTION

This is an immigration case in which petitioners, Victoria Tchoukhrova, Dmitri Tchoukhrov, and Evgueni Tchoukhrov ("petitioners"), seek review of a final order of removal issued by the Board of Immigration Appeals ("the Board").[1] A.R. at 1.[2] The Board affirmed an Immigration Judge's decision that petitioners were removable from the United States pursuant to section 237(a)(1)(B) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(1)(B)(2000), for remaining in the United States

---

[1] Petitioner, Victoria Tchoukhrova, was the lead asylum applicant before the Board with petitioners Dmitri Tchoukhrov and Evgueni Tchoukhrov being derivative asylum applicants.

[2] The abbreviation "A.R." refers to the Certified Administrative Record on file with the Court.

for a period longer than authorized.[3] The Board further affirmed the Immigration Judge's finding that petitioners were ineligible for asylum and withholding of removal under sections 208(a), and 241(b)(3) of the INA, 8 U.S.C. §§ 1158(a), 1231(b)(3). The Board also found that petitioners abandoned their application for withholding of removal under the Convention Against Torture ("CAT") because they failed to challenge the Immigration Judge's denial of their CAT application before the before the [sic] Board.[4]

The Board's jurisdiction arose under 8 C.F.R. § 1003.1(b)(3) (2003), which grants the Board appellate jurisdiction over decisions of Immigration Judges in removal proceedings initiated by the former Immigration and Naturalization Service ("INS").[5]

Because petitioners were placed in removal proceedings after April 1, 1997, the Court's jurisdiction is governed by INA § 242(a), 8 U.S.C. § 1252(a). Petitioners are subject to a final order of removal issued by the Board; therefore, pursuant to INA § 242(a), this Court has jurisdiction to review this matter. *Aragon-Ayon v. INS*, 206 F.3d 847 (9th Cir. 2000). Under this statute, a petition for

---

[3] Unless otherwise indicated, citation to the United States Code will be the latest official 2000 version.

[4] This refers to Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex. 39 U.N. GAOR Supp. (No. 51 at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987, which has been implemented by regulations promulgated by the Attorney General. *See* 8 C.F.R. §§ 208.16, 18 (2002).

[5] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice and its functions were transferred to the Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 110 Stat. 2135 (Nov. 25, 2002).

review is timely if filed not later than 30 days after the date of the final order of removal. INA § 242(b)(1), 8 U.S.C. § 1252(b)(1). The Board entered its final order of removal on February 25, 2003, and petitioners filed their Petition for Review on March 13, 2003. The Petition for Review was filed not later than 30 days after the date of the final order of removal and is therefore timely.

ISSUES PRESENTED

1) Whether substantial evidence supports the Immigration Judge's finding that petitioners were not persecuted in the past in Russia and, to the extent they were mistreated while living in that country, it was the result of discrimination, an unprotected ground under the INA.

2) Whether substantial evidence supports the Immigration Judge's decision that petitioners did not have a well-founded fear of future persecution in Russia where their claims were wholly speculative, and are not supported by any evidence in the record, and the evidence does not "compel" a contrary conclusion.

3) Whether this Court should remand the case should it find that substantial evidence does not support the Immigration Judge's finding that petitioners were not persecuted in the past, or have a well-founded fear of future persecution in Russia, so the agency can consider in the first instance whether the conduct petitioners experienced in the past, or fear in the future in Russia is "on account" of one of the five grounds set forth in the INA.

STATEMENT OF THE CASE

Petitioners are natives and citizen of Russia, who entered the United States on or about September 9, 2000, as a [sic] nonimmigrant visitors authorized to remain in the United States until March 8, 2001. A.R. 338, 353, 367. On March 20, 2001, Notices to Appear ("NTA") were issued by the INS charging petitioners with being removable from the United States, pursuant to section 237(a)(1)(B) of the INA, for remaining in the United States for a period longer than authorized. A.R. 339, 354, and 368.

In a hearing before an Immigration Judge, on April 9, 2001, petitioners admitted the factual allegations, conceded they were removable as charged in the NTAs, A.R. 68, and indicated they wanted to apply for asylum, withholding of removal, and protection under CAT and, in the alternative, voluntary departure. A.R. 68 [sic] On August 8, 2001, after a hearing on the merits, an Immigration Judge denied petitioners' applications for asylum, withholding of removal, and relief under CAT finding petitioners failed to establish they were persecuted in the past in Russia, or had a well-found [sic] fear of future persecution in Russia on account of their political opinion, or membership in a particular social group. A.R. 59-64. The Immigration Judge also found petitioners failed to establish they would be tortured if returned to Russia and, therefore, denied their application for protection under CAT. A.R. 62-63.

On February 25, 2003, the Board adopted and affirmed the Immigration Judge's decision, and dismissed the appeal.[6] A.R. 13.

---

[6] This Court lacks subject matter jurisdiction to consider the Immigration Judge's denial of petitioners' applications for CAT

(Continued on following page)

STATEMENT OF THE FACTS

A. Proceedings Before the Immigration Court.

The Immigration Judge's decision contains a description of the documentary exhibits and a summary of the testimony offered at petitioners' removal hearing. *See* A.R. 34-43. In view of the Immigration Judge's detailed summary of the testimony, respondent incorporates those portions of the Immigration Judge's decision as the description of the evidence and its statement of the facts.

B. The Decision of the Immigration Judge.

On August 8, 2001, the Immigration Judge denied petitioners' applications for asylum, withholding of removal, and protection under CAT finding petitioners were not persecuted in the past in Russia, and that they failed to establish they had a well-founded fear of future persecution in Russia. A.R. 51-63. The Immigration Judge also found petitioners were ineligible for protection under CAT because they failed to establish they would be tortured if they were returned to Russia. *Id.* After setting forth the standards for asylum, withholding of removal, and CAT,

---

protection since they failed to challenge that denial before the Board and, therefore, failed to exhaust their administrative remedies on that claim. *See* 242(d)(1) of the INA, 8 U.S.C. § 1252(d)(1) (requiring exhaustion of administrative remedies as a prerequisite for review); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997); *Vargas v* [sic] *INS*, 821 F.2d 906, 907 (9th Cir. 1987). In addition, petitioners in their brief failed to address this claim in their brief to the Court and, therefore, have abandoned that claim before this Court. *See United States v. Tisor*, 96 F.3d 370, 376 (9th Cir. 1996) (failure to brief an issue raised in section heading results in waiver of right to appeal); *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991) (failure to brief an issue in a timely fashion may constitute waiver of the issue on appeal).

the Immigration Judge denied petitioners' requests for relief, finding petitioners failed to meet their burden of proof of establishing past persecution, or a well-founded fear of future persecution in Russia, or the possibility of being subject to torture in that country. A.R. 59-63. The Immigration Judge found that petitioner Victoria Tchoukhrova was a credible witness, but was prone to exaggerate the facts in her case. A.R. 54. The Immigration Judge found petitioners' claims of political persecution in Russia were based on petitioner Victoria Tchoukhrova's opposition to the Russian government's policies toward providing services for persons with disabilities, which she expressed on a few occasions to a group of parents of disabled children in Russia, her attempts to publish a newspaper article in Russia criticizing the Russian government's treatment of disable persons in Russia, and her having joined the Moon organization. A.R. 55.

The Immigration Judge also found petitioners' [sic] alleged they were persecuted in the past, and had a well-found fear of future persecution in Russia on account of their membership in [a] particular social group, consisting of the family of a disabled child. A.R. 55. The Immigration Judge also found petitioners claimed their son Evgueni Tchoukhrov, as a disabled child, was persecuted in the past and would be persecuted in the future on account of his membership in a particular social group consisting of "disabled child[ren] in Russia." A.R. 58.

The Immigration Judge indicated, in dicta, that petitioners "appear[ed]" to have been harmed in Russia on account of their being members of a particular social group (as a family with a disabled child), but did not actually address or decide the social group issue in his decision, and instead found that petitioners' past

experiences did not rise to a level of conduct constituting persecution under the INA. A.R. 59. The Immigration Judge found the "fact that the [petitioners'] son was unable to get the quality of medical treatment that he [could] secure in the United States is not persecution." A.R. 59. The Immigration Judge also found that petitioners' child did receive medical treatment in Russia, but that the petitioners did not agree it was the proper treatment for their child. A.R. 57. While the Immigration Judge found it "troubling" that petitioners' disabled child was unable to attend public school in Russia, the Immigration Judge found that it was "unclear" from the record why that was the case. A.R. 59. The Immigration Judge found there were several possible explanations shown by the record. A.R. 59-60. He speculated that on [sic] possible explanation was that the Russian government was "attempting to punish handicapped people by preventing them from attending public school." A.R. 59. However, relying on evidence of country conditions found in the record, the Immigration Judge found that "it could also be concluded from the facts in this case that the Russian government [did] not have sufficient resources to provide adequate schooling for handicapped children." A.R. 60. The Immigration Judge found that this explanation was supported by a U.S. Department of State country report on Russia, dated 2000, contained in the record which showed that "Russia is in dire economic straits," and that "Russia does not appear to have sufficient resources to educate handicapped children." A.R. 60.

Relying on the same U.S. Department of State country report, the Immigration Judge found that, in general, children in Russia "are certainly not treated as they are in more developed nations, and that prospects for children

with disabilities are "extremely bleak" in Russia. A.R. 60. Quoting from the same country report, the Immigration Judge found that in Russia "the label of 'imbecile' or idiot, which signifies uneduatable [sic], is almost always irrevocable," and "the most likely future [for such persons] is a lifetime in state institutions." A.R. 60. The Immigration Judge also found that the Russian constitution does not address directly the issue of discrimination against disabled persons, and that, although laws exist in Russia that prohibit discrimination in that country, the Russian government has not enforced them. A.R. 61. Finally, the Immigration Judge noted that to the extent the Russian government does provide assistance for the disabled in Russia, it is directed to miliary [sic] veterans and, that while special institutions exist for children with disabilities in Russia, they do not serve the children's needs adequately. A.R. 61.

Even taking into account the hardships suffered by the disabled in Russia as set forth in the record, the Immigration Judge found that the family's past experiences, while unfortunate, simply did not rise to the level of conduct qualifying as persecution for purposes of asylum. A.R. 61. Instead, the Immigration Judge found that any harm the petitioners suffered while in Russia was the result of discrimination in that country against those with disabilities, not persecution. A.R. 61. The Immigration Judge found that while there is substantial discrimination against persons in Russia with disabilities, discrimination is not persecution under the INA. *Id.*

The Immigration Judge also rejected petitioners' claim that if they were returned to Russia, petitioners' child would be killed, and they would be imprisoned. A.R. 61-62. The Immigration Judge found there claims entirely

speculative and "lack[ing] any factual basis." A.R. 61. In rejecting petitioners' claims of future persecution, the Immigration Judge noted that the petitioners were able to live in Russia without ever being arrested, and that despite pressure from the Russian authorities to institutionalize their disabled child, he was allowed to continue to live with his parents. A.R. 61-62. The Immigration Judge also found the petitioners were allowed to leave Russia on three separate occasions to come to the United States to secure adequate medical treatment for the child. A.R. 62. Based on this evidence, the Immigration Judge found that petitioners failed to establish an objectively well found fear of future persecution. *Id.* The Immigration Judge also found that petitioners failed to establish they would be tortured if returned to Russia and, therefore, were ineligible for protection under CAT. A.R. 62.

C. The Decision of the Board of Immigration Appeals.

On February 25, 2003, the Board adopted and affirmed the Immigration Judge's decision relying on *Matter of Burbano*, 20 I & N Dec. 872, 874 (BIA 1994) (the Board's independent review authority does not preclude the Board from adopting or affirming a decision of the immigration judge, in whole or in part, when we are in agreement with the reasoning and result of that decision). A.R. 13-14. While noting that petitioners "presented a very sympathetic family history," the Board found that the [I]mmigration Judge's [sic] was correct in finding that the petitioners did not demonstrate that they were persecuted in the past, or had a well-founded fear of future persecution in Russia. A.R. 61. The Board also found that the petitioners abandoned their CAT claim because they did not address it to

the Board. A.R. 13. Based on that finding, the Board dismissed petitioners' appeal.

SUMMARY OF THE ARGUMENT

Substantial evidence supports the Immigration Judge's finding that petitioners were not persecuted in the past in Russia and, to the extent they were mistreated while living in that country, it was the result of discrimination, an unprotected ground under the INA.

Substantial evidence also supports the Immigration Judge's finding that petitioners did not have a well-founded fear of future persecution in Russia where petitioners' claims were wholly speculative, and were not supported by any evidence in the record, and the evidence does not "compel" a contrary conclusion.

Alternatively, should this Court find that substantial evidence does not support the Immigration Judge's finding that petitioner [sic] were not persecuted in the past, or have a well-founded fear of future persecution in Russia, this Court must remand petitioners' case to the agency to determine whether the conduct petitioners experienced in the past, or fear in the future was "on account" of one of the five grounds set forth in the INA.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE IMMIGRATION JUDGE'S FINDING THAT PETITIONERS WERE NOT PERSECUTED IN THE PAST, OR HAVE A WELL-FOUNDED FEAR OF FUTURE PERSECUTION IN RUSSIA.

A. Statutory Standard and Burden of Proof

Section 208(a) of the INA, 8 U.S.C. § 1158(a), authorizes the Attorney General, "in his . . . discretion," to grant asylum to an alien who can demonstrate that he is a "refugee" within the meaning of section 101(a) (42) of the INA, 8 U.S.C. § 1101(a)(42). Section 101(a) (42) defines a refugee as an alien who is "unable or unwilling to return to [his country] . . . because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

If an alien shows he suffered past persecution, the likelihood of future persecution becomes relevant in the exercise of discretion. *In re Chen,* 20 I.& N. Dec. 16, 18 (BIA 1989); *Kazlauskas v. INS,* 46 F.3d 902, 905 (9th Cir. 1995). If an alien establishes he is a "refugee" because of past persecution, then a rebuttable presumption arises that he has reason to fear similar persecution in the future. *Id.* In that situation, the INS ordinarily will have to present evidence rebutting the presumption. *Id.* In assessing the likelihood of future persecution, the BIA has held that a change in circumstances can rebut the presumption of the threat of persecution. *In re Chen,* 20 I. & N. Dec. at 18. On the other hand, in instances of exceptional past persecution, in spite of any change in circumstances, asylum may be granted in the exercise of discretion for compelling humanitarian reasons. *Id.* At the

time of petitioner's deportation hearing, the *Chen* past persecution standard of proof has been codified at 8 C.F.R. § 208.13(b)(1) (1998).

Regarding the well-founded fear standard for future persecution, the BIA in *In re Mogharrabi,* 19 I. & N. Dec. 439 (BIA 1987), held that an asylum applicant must show a "reasonable person in [the petitioners'] circumstances would fear persecution" if returned to his country. The well-founded fear standard requires a showing of genuine subjective fear and a demonstration of credible, direct, specific evidence showing that this fear is objectively reasonable. *Berroteran-Melendez v. INS,* 955 F.2d 1251, 1256 (9th Cir. 1992) (quoting *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1002 (9th Cir. 1988)). This standard has been promulgated by the Attorney General and set forth at regulation 8 C.F.R. § 208.13(b)(2) (1998).

Section 421(b)(3)(A) [sic] of the INA, 8 U.S.C. § 1231(b)(3)(A) provides that an alien shall not be removed if "the alien's life or freedom would be threatened in that country because of an alien's race, religion, nationality, membership in a particular social group, or political opinion." *See also Molina-Estrada v. INA* [sic], 293 F.3d 1089 (9th Cir. 2002). To qualify for withholding of removal, an alien must demonstrate that "it is more likely than not that he would be subject to persecution on one of the specified grounds" set forth in the INA. *Al-Harbi v. INS,* 242 F.3d 882, 888 (9th Cir. 2000) (internal cites omitted). This "clear probability" standard for withholding of removal is more stringent than the well-founded fear standard governing asylum claims. *Id.* The well-founded fear standard for asylum requires less of an evidentiary showing than the clear probability standard for withholding of deportation. *Id.* Accordingly, an alien who fails to show a well-founded fear

of persecution will, by definition, fail to show a clear probability of persecution. *Id.* Upon establishing statutory eligibility, the alien's entitlement to withholding of removal is mandatory. Unlike asylum, withholding of removal cannot be denied in the exercise of discretion. *Al-Harbi v. INS,* 242 F.3d at 888.

The burden of proof is on the petitioner to establish eligibility for asylum and withholding of deportation. *INS v. Stevic,* 467 U.S. 407, 422 n.16 (1984); *Sangha v. INS,* 103 F.3d 1482, 1486-87 (9th Cir. 1997); *Castillo v. INS,* 951 F.2d 1117, 1121 (9th Cir. 1991); *see* 8 C.F.R. §§ 208.13(a), 208.16(b), and 242.17(c)(4)(iii) (1996).

B. Standard of Review

The Immigration Judge's factual findings regarding eligibility for asylum or withholding of removal are reviewed for substantial evidence. *INS v. Elias-Zacarias,* 502 U.S. 478, 481 (1992); *Fisher v. INS,* 79 F.3d 955, 961 (9th Cir. 1996) (en banc). The discretionary denial of asylum is reviewed under the abuse of discretion standard. *Abedini v. INS,* 971 F.2d 188, 191 (9th Cir. 1992); *Vides-Vides v. INS,* 783 F.2d 1463, 1466 (9th Cir. 1986). Credibility findings are reviewed for substantial evidence. *Turcios v. INS,* 821 F.2d 1396, 1399 (9th Cir. 1987).

Given the Attorney General's broad discretion in granting asylum, and the deferential substantial evidence standard of review, this Court has stated both that it will not reverse the BIA merely if it disagrees with the BIA's evaluation of the facts and that it will affirm the BIA if its conclusion is substantially reasonable. *Castillo,* 951 F.2d at 1120; *De Valle v. INS,* 901 F.2d 787, 790 (9th Cir. 1990).

In a further elucidation of the substantial evidence standard in asylum cases, the Supreme Court held in *Elias-Zacarias,* 502 U.S. at 481 & n.1, that if substantial evidence supports the BIA's denial of asylum, the decision can be reversed "only if the evidence . . . was such that a reasonable fact finder would have to conclude that the requisite fear of persecution existed," adding that the evidence would not only have to "support" the reversal, but "compel" it. *See also Abedini v. INS,* 971 F.2d at 191. Thus, the Supreme Court concluded that in order for the BIA's denial of asylum or withholding of deportation to be reversed, the record evidence would have to be "so compelling that no reasonable fact finder could fail to find the requisite fear of persecution." *Elias-Zacarias,* 502 U.S. at 484; *Aruta v. INS,* 80 F.3d 1389, 1396 (9th Cir. 1996). This Court has stated that *Elias-Zacarias* is the "definitive statement" of the substantial evidence standard in asylum cases. *Prasad v. INS,* 47 F.3d 336, 339 (9th Cir. 1995). *See also San[g]ha v. INS,* 103 F.3d 1482, 1487 (9th Cir. 1997).

Questions of law regarding statutory interpretation of the INA are to be reviewed *de novo,* with substantial deference to the BIA. *See INS v. Aguirre Aguirre,* 119 S.Ct. 1439, 1445 (1999).

Finally, review is generally limited to the decision of the Board, except to the extent that it has adopted the decision of the Immigration Judge. *Ghaly v. INS,* 58 F.3d 1425, 1429 (9th Cir. 1995); *Alaelua v. INS,* 45 F.2d 1379, 1382 (9th Cir. 1995); *Elnager v. INS,* 930 F.2d 784, 787 (9th Cir. 1991); *Matter of Bur[b]ano,* 20 I & N Dec. 872, 874 (BIA 1994). Because the Board adopted and affirmed the Immigration Judge's decision, this Court reviews the Immigration Judge's decision. *Id.*

C. Substantial Evidence Supports The Immigration Judge's Finding That The Conduct Petitioners Experienced In The Past Did Not Amount To Persecution.

Petitioners claim that because of their son's disability, they were persecuted on account of their political opinion, and membership in [sic] particular social group in Russia. Pet. Br. at 7-21. However, this calm [sic] is without merit. Instead, a review of the record in this case establishes the petitioners were not persecuted while in Russia and, to the extent they were mistreated while living in that country, it was the result of discrimination, an unprotected ground under the INA. Additionally, petitioners in this case improperly conflate the actions of the Russian government and those of the general population in Russia. However, as set forth below, many of the events relied on by the petitioners cannot be tied to the Russian authorities, or by groups it cannot, or are unwilling to control.

As mentioned earlier, in order to be eligible for asylum an applicant must demonstrate either past persecution, or a well-founded fear of future persecution, on account of one of the qualifying reasons under the INA. *See* 8 U.S.C. §§ 1101(a)(42), 1158; 8 C.F.R. §§ 208.13(b)(1) and (2) (1995). The INA does not define the term "persecution." "In ordinary usage, the term 'persecution' denotes extreme conduct." *Fatin v. INS*, 12 F.3d 1233, 1240 (3rd Cir. 1993). "For example, The Random House Dictionary of the English Language 1444 (2d ed. 1987) defines the term to mean 'a program or campaign to exterminate, drive away, or subjugate a people because of their religion, race, or beliefs[,]' [and there is] nothing indicating that Congress

intended to depart from the ordinary meaning of the term. . . . " *Id.*

The BIA has construed the term to mean "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive." *See, e.g., Matter of S-A-,* Int. Dec. 3433, ___ I & N Dec. ___, 2000 WL 827754 (BIA 2000), quoting *Ghaly,* 58 F.3d at 1431; *see also Matter of Acosta,* 19 I & N Dec. 211, 221 (BIA 1985) ("the infliction of suffering or harm on those who differ in a way regarded as offensive"). This is also the meaning given to the term "persecution" in this and other Circuits. *See, e.g., Duarte de Guinac v. INS,* 179 F.3d 1156 (9th Cir. 1999); *Fisher,* 79 F.3d at 961; *Kovac v. INS,* 407 F.2d 102 (9th Cir. 1969).

As this Court has stated, "[p]ersecution is an extreme concept that does not include every sort of treatment our society regards as offensive." *Fisher,* 37 F.3d at 1376. "Discrimination . . . as morally reprehensible as it may be, does not ordinarily amount to 'persecution' within the meaning of the [INA]." *Ghaly,* 58 F.3d at 1431; *see also Bucur v. INS,* 109 F.3d 399 (7th Cir. 1997). "Otherwise hundreds of millions of people would be eligible for asylum in the United States." *Bucur,* 109 F.3d at 402. Not every "bullying" tactic rises to the level of persecution. *Marquez v. INS,* 105 F.3d 374, 379,-80 [sic] (7th Cir. 1997). "Mere repugnance of . . . a governmental policy to our own concepts of . . . freedom [is] not sufficient to justify labeling that policy as persecution." *Fatin,* 12 F.3d at 1240. "If persecution were defined that expansively, a significant percentage of the world's population would qualify for asylum in this country – and it seems most unlikely that Congress intended such a result." *Id.* at at [sic] 1240.

In order to show persecution, an alien must show mistreatment that rises above discrimination, harassment, or even basic suffering. *Cf. Prasad,* 47 F.3d at 337-38 (no past persecution where Indo-Fijian was subjected to religious and ethnic discrimination, rocks were thrown at his house, his wife was harassed by military, and experienced one brief arrest and detention with some physical mistreatment); *Fisher v. INS,* 291 F.3d at 494-95 (8th Cir. 2002) (no past persecution in Ukraine based on activities reviving Lutheran church, where educational and job opportunities were curtailed, salary was cut, church was infiltrated by KGB, and applicant received veiled threats of problems at work if he pursued religious activities); *Mikhailevitch v. INS,* 146 F.3d 384, 389 (6th Cir. 1998) (no past persecution in Communist Belarus based on Roman Catholic beliefs and activities, where believers of all faiths were subject to discrimination, KGB questioned alien on several occasions and conducted searches of home and place of business, and on one occasion arrived at home at 1:00 a.m. and knocked on door for 40 minutes). *Contrast Korablina v. INS,* 158 F.3d 1038, 1039-44 (9th Cir. 1998) (compelling evidence of past persecution in Ukraine of Jewish applicant, based on the robbery and beatings of employers, violent attacks by ultranationalists against Jews, incident in which applicant was tied to chair with noose around neck, threatened with death, and beaten requiring hospitalization, and attacks on family members who were badly beaten or threatened with rape); *Matter of O-Z- and I-Z-,* 22 I & N Dec. 23 (BIA 1998) (past persecution in Ukraine, where Jewish alien faced years of housing and employment discrimination, was physically attacked and beaten on several occasions, received multiple anti-Semitic threats and messages at home, apartment was

vandalized, son was dragged from classroom at school by schoolmates, beaten, and forced to remove his pants).

Also inherent in the concept of "persecution" is the requirement that it must be inflicted by the Government, or by persons the Government is unable or unwilling to control. *Sangha v. INS,* 103 F.3d 1482, 1487 (9th Cir. 1997). Conduct that "the government does not sponsor and in which it is not complicit" does not support asylum. *Rodas-Mendoza v. INS,* 246 F.3d 1237, 1240 (9th Cir. 2001). There is no "persecution" where conduct is not "condoned by the state." *Ghaly,* 58 F.3d at 1431. "[V]iolence completely untethered to a governmental system does not afford a basis for asylum." *Grava v. INS,* 205 F.3d 1177, 1181 n. 3 (9th Cir. 2000). Evidence that the police were ineffective does not suffice. *See Brijmati Singh v. INS,* 134 F.3d 962, 968 (9th Cir. 1997).

Given these standards, substantial evidence supports the Immigration Judge's finding that petitioners failed to establish that the conduct they experienced in the past rose to the level of "persecution."

Petitioners in this case have failed to set forth any facts which establish that they were persecuted while living in Russia. The fact that petitioners' child was not provide [sic] with the level of medical care in Russia that petitioners could obtain in the United States does not amount to persecution. In fact, the record in this case establishes that the petitioners' child was given medical treatment for his disability while in Russia, but that petitioners did not believe it was either sufficient, or the proper therapy for their child. A.R. 110-111. However, the fact that the "proper" medical therapy was unavailable according to petitioner is not persecution.

Nor does petitioners' child [sic] inability to enroll in a public school because of his disability amount to persecution. The record in this case establishes that the Russian economy is having extreme economic problems, and as a result Russia does not have the economic resources to educate handicapped children. A.R. 206, 242. The fact the Russia government decides to use its resources to fund other programs, rather than providing non-institutional medical care for children with disabilities, does not amount to persecution. Furthermore, the petitioners have not establish [sic] that there are no private schools or hospitals in Russia that could assist petitioners' child. In fact, petitioner Victoria Tchoukhrova admitted that her child was [sic] received [sic] private medical care while in Russia. A.R. 100.

Nor does petitioner Victoria Tchoukhoriva's [sic] car being stoned by unknown assailants after she attended a meeting of parents with disabled children amount to persecution. While such an event was unsettling for the petitioner, petitioner was not harmed by her car being stoned, and does not amout [sic] to persecution. *Prasad v. INS,* 47 F.3d at 339-40; *Ghaly v. INS,* 58 F.3d at 1431.

Petitioners also claim that petitioner Dmitri Tchoukhrova lost his job because he had a disabled son. Pet. Br. at 17. However, besides petitioners' unsupported statement, petitioners do not offer any evidence which would support such a conclusion. In fact, the record establishes that petitioner's husband was employed in Russia until 1997, nearly six years after the birth of petitioners' disabled son. A.R. 117-118. Moreover, even if petitioner Dmitri Tchoukhrova lost his job because he had a disabled child, this would not be considered persecution under the INA. *Nagoulko v. INS,* 333 F.3d 1012 (9th Cir. 2003) (being

fired from job did not rise to level of persecution); *Saballo-Cortez v. INS,* 761 F.2d 1259, 1264-65 (9th Cir. 1985) (denial of discounts on food and denial of special work permit not sufficient to establish persecution). In addition, petitioners failed to establish that the government in Russia imposed "deliberate imposition of substantial economic disadvantage upon" them in firing petitioner Dmitri Tchoukhrov on account of one of the protected grounds under the INA. *Kovac v. INS,* 407 F.2d 102 (9th Cir. 1969). Nor do the facts in this case support a claim of severe economic deprivation. *Id*; *Baballah v. Ashcroft,* 335 F.3d 981 (9th Cir. 2003) (severe harassment, threats, violence and discrimination made it virtually impossible for applicant to earn a living). Instead, petitioners traveled several times to the United States and were able to afford private medical care for their child. In addition, petitioner Victoria Tchoukhrova stated that she supported the family by decorating for wealthy families in Russia. A.R. 118.

Petitioners also rely on two incidents in which their son was injured by unknown persons in Russia. During the first instance, petitioners' son was attacked by an unknown group of young men who grabbed their son and were carrying him towards a lake in a park. A.R. 119-121. Petitioner Victoria Tchoukhrova chased after the young men who then dropped petitioners' child. A.R. 119. As a result of being drop[sic], petitioners' child was hospitalized for two months with a broken arm and injuries to his face. A.R. 120. In another incident, petitioners' son was injured by an unknown woman in a park after the woman pushed him down to the ground because he touched an article of her clothing. A.R. 126. Petitioners' son suffered a severe laceration to is [sic] head which required medical treatment at

a hospital. A.R. 127. However, these events to do not amount to persecution. Petitioners have failed to establish, let alone claim, that their son's alleged assailants were part of the government in Russia, or from a group the government was unwilling or unable to control. Nor could they, petitioners admitted they were unable to identify their son's assailants. A.R. 119-120. To the extent petitioners cannot establish their son's assailants were with the government, or a group it could not, or was unwilling to control, the alleged attacks on the petitioners' son were not persecution under the INA. This Court has repeatedly held that persecution under the INA means acts either committed by the government or a group the government was unable or unwilling to control. *Adebisi v. INS*, 952 F.2d 910, 913-14 (9th Cir. 1992) and case cited therein. *See also, Sotelo-Aquije v. Sattery*, 17 f.3d [sic] 33, 37 (2d Cir. 1994) (same); *McMullen v. INS*, 658 F.3d 1312, 1315 & n.2 (9th Cir. 1981); *Matter of Laipenieks*, 18 I & N Dec. 433, 456-57 (BIA 1983) *rev'd on other grounds*, 750 F.2d 1427 (9th Cir. 1985) (persecution under the INA means "[t]he infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive. . . . "). Nor does the fact that petitioner Victoria Tchoukhrova and her son were subject to derogatory comments on one occasion in a park amount to persecution. *See Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 1999) (mere unfulfilled threats with no evidence of injury, harm or mistreatment do not constitute "persecution.").

While petitioners did not live under ideal conditions in Russia, to the extent that they were mistreated in that country does not amount to persecution. Instead, substantial evidence supports the Immigration Judge's decision that petitioners were victims of discrimination in Russia.

The record in this case establishes that discrimination exists in Russia against children and their families with disabilities. A.R. 242. While respondent does not condone discrimination, a claim of discrimination by itself is not persecution under the Act. *Ghaly v. INS*, 58 F.3d at 1429 ("discrimination on the basis of race or religion, as morally reprehensible as it may be, does not ordinarily amount to "persecution" within the meaning of the Act"); *Bucur v. INS*, 109 F.3d at 402 (7th Cir. 1997) ("discrimination is not persecution"); and *Fatin v. INS*, 12 F.3d at 1243 (3rd Cir. 1993) ([t]he concept of persecution does not encompass every sort of unfair treatment that our society regards as offensive . . . unjust, or even unlawful or unconstitutional.").

D. Substantial Evidence Supports the Immigration Judge's Determination That the Petitioners Failed to Show a Well-founded Fear of Future Persecution in Russia.

Petitioners claim that if they are returned to Russia their son will be killed, and they will be imprison [sic] based on the fact their son is disabled. Petitioners' claim is wholly speculative, and is not supported by any evidence in the record. Petitioners offered no testimony or evidence showing even a remote possibility that their son would be killed, or that they would be imprisoned if returned to Russia. In fact, the record in this case supports an exact opposite conclusion. Petitioners admit that they were allowed to travel back and forth between Russia and the United States on several occasions without any incident. A.R. 122-123. Nor did the Russia [sic] authorities ever attempt to stop their travels to the United States. A.R. 122-123. In addition, the record in this case is completely void of any

evidence that the Russian authorities kill young school-aged children because they are disabled, or imprison their parents for having disabled children. To the extent petitioners claim their child would be "killed" because he would not receive proper medical treatment, nothing in the record supports this claim. Instead, the record in this case establishes petitioners' child had access to public and private medical assistance, and was given emergency medical help on several occasions in Russia. While not to diminish what has happen [sic] to the petitioners in Russia, petitioners nevertheless have failed to establish that they have a well-founded fear of future persecution in Russia.

Alternatively, should this Court find that substantial evidence does not support the Immigration Judge's finding of no past persecution or well-founded fear of future persecution in Russia, this Court must remand petitioners' case to the agency to determine whether the conduct experienced in the past or feared in the future is "on account" of one of the five grounds set forth in the INA. In this case, the Immigration Judge indicated, in dicta, that petitioners "appear[ed]" to have been harmed in Russia as "a result of" their being a member of a particular social group (a family with a disabled child), but did not actually address or decide the social group issue, and instead found that petitioners' past experiences did not rise to the level of conduct constituting persecution under the INA. A.R. 59. Thus, the Immigration Judge made no finding as to whether petitioners were members of a particular social group. In fact, there is no discussion of the legal requirements for establishing a claim of persecution on account of a particular social group in the Immigration Judge's decision. The petitioners acknowledge this when they admit in their brief that neither the "immigration judge

nor the BIA gave any legal analysis as to" whether the petitioners "belong[ed] to a particular social group. . . . " Pet. Br. 8. Nor did the Immigration Judge make any finding as to whether petitioners were persecuted on account of their alleged political opinion. In fact, the Immigration Judge's decision itself establishes he made no such findings. Under section 208 of the INA, an Immigration Judge is first required to establish whether an alien has been persecuted, and then whether that finding comes under one of the five categories under section 208 of the INA in order to determine eligibility for asylum.

Since the Immigration Judge did not make a final ruling on whether the conduct petitioners' experienced or fear was on account of membership in a particular social group, or a political opinion, this Court must remand this case to the Board in order to allow it to decide these issue [sic] in the first instance. *INS v. Ventura*, 123 S. Ct. 353 (2002) (requiring remand on issues not decided by the agency below). When a court reviews an adjudicatory decision by a federal agency that Congress has charged with administering a statute, a respect for the agency's primary jurisdiction requires the court to refrain from rendering its own findings of fact or resolving issues the agency did not consider. *Id.* In fact, "[g]enerally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands. This principle has obvious importance in the immigration context." *Ventura*, 123 S. Ct. at 355. *See also Port of Portland v. United States*, 408 U.S. 811, 842 (1972) ("[o]ur appellate function in administrative cases is limited to considering whether the announced grounds for the agency decision comport with applicable legal principles"); *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("an

appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."). A court of appeals "is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Ventura*, 123 S. Ct. at 355, *quoting Florida Power & Light Co. v. Lorian*, 470 U.S. 729, 744 (1985). Rather, if the agency has not decided certain aspects of the case, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. *Florida Power & Light Co.*, 470 U.S. at 744.

In light of these firmly established principles, the Supreme Court held in *Ventura* "that well-established principles of administrative law did require the Court of Appeals to remand the 'changed circumstances' question to the [Board]." *Ventura*, 123 S. Ct. at 355.

Just as remand was warranted in *Ventura* because the Board had not reached the "changed circumstances" question, remand is required if the Court finds substantial evidence does not support the Immigration Judge's persecution finding here, since the Immigration Judge did not decide whether any alleged persecution in this case came under one of the five categories under section 208 of the INA. As previously discussed, the Immigration Judge denied petitioners' asylum and withholding applications on the basis that petitioners were not persecuted in the past and did not show a well-founded fear of future persecution in Russia. Consequently, under *Ventura* and other binding precedent, this Court may not reach the issue of whether said persecution was "on account of" petitioners being a member of a particular social group, or any of the other grounds provided in the INA, because these issues have not been finally addressed and decided by the agency

below. *See also INS v. Chen*, 326 F.3d 1316 (9th Cir. 2003) (once court has reversed decision of the Board it is appropriate to remand so BIA can decide asylum issues rather than for Court to decide issues); *Singh v. INS*, 292 F.3d 1017, 1025 (9th Cir. 2002) (reversing Board's adverse credibility determination and remanding, but declining to consider merits of asylum claim where "the Board had not yet had an opportunity to address the remaining issues.").

II. PETITIONERS FAILED TO MEET THEIR BURDEN OF ESTABLISHING WITHHOLDING OF REMOVAL.

As already set forth above in the discussion of the controlling law section, in order to be eligible for withholding of removal under section 241(b) (3) of the INA, an alien must demonstrate a "clear probability of persecution," showing by objective evidence that persecution is "more likely than not." As argued above, petitioners failed to satisfy the lower burden of proof required for asylum. Therefore, they necessarily failed to satisfy the clear probability standard of eligibility required for withholding of removal. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987); *De Valle v. INS.*, 901 F.2d at 790 (where petitioner failed to meet threshold burden of establishing statutory eligibility for asylum, he could not meet the tougher standard required for withholding of deportation). Thus, the Immigration Judge was correct in denying petitioners' application for withholding of removal. A.R. 2-3.

CONCLUSION

For the reasons stated above, the petition for review should be denied and the decision of the Immigration Judge should be affirmed.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

MARGARET J. PERRY
Senior Litigation Counsel

/s/ [Illegible]
WILLIAM C. ERB, Jr., Attorney
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 616-4869

Dated: November 24th, 2003 Attorneys for Respondent

STATEMENT OF RELATED CASES

In accordance with Local Circuit Court Rule 28.1 (a)(ii), counsel for respondent declares that based on a survey of the attorneys in this office, he is not aware of any related cases pending in this Circuit.

/s/ [Illegible]
WILLIAM C. ERB, JR., Attorney
Office of Immigration Litigation
Civil Division
U.S. Department of Justice

Dated: November 24th, 2003

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a) AND NINTH CIRCUIT RULE 32.

I certify that pursuant to Fed. R. App. P. 32(a)(4), (5), (6), and (7), and Ninth Circuit Rule 32, the attached Brief For Respondent is monospaced spaced [sic], has a typeface of 12 points (Courier New), contains 879 lines and 7,490 total words, and contains fewer than 22 pages.

/s/ [Illegible]
WILLIAM C. ERB, JR., Attorney
Office of Immigration Litigation
Civil Division
U.S. Department of Justice

Dated: November 24th, 2003

CERTIFICATE OF SERVICE

I certify that on the 24th day of November, 2003, two copies of the **BRIEF FOR RESPONDENT** were placed in a mail room at the United States Department of Justice for service by same-day mailing, first-class postage pre-paid, upon petitioner's counsel at the following address:

Mr. Jonathan D. Montag
P.O. Box 124801
San Diego, CA 92112

/s/ [Illegible]
WILLIAM C. ERB, JR., Attorney
Office of Immigration Litigation
Civil Division
Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 616-4869

Dated: November 24th, 2003

(4)

FILED
AUG 18 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1401

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

VICTORIA TCHOUKHROVA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

PUBLISHERS NOTE

PAGE II AND PAGE III
MISSING IN ORIGINAL
DOCUMENT

TABLE OF AUTHORITIES

Page

Cases:

Abay v. *Ashcroft*, 368 F.3d 634 (6th Cir. 2004) 4, 5
Abebe v. *Gonzales*, 432 F.3d 1037 (9th Cir. 2005) 4
C-Y-Z, In re, 21 I. & N. Dec. 915 (BIA 1997) 4
Chen, In re, 20 I. & N. Dec. 16 (BIA 1989) 5
Gonzales v. *Thomas*, 126 S. Ct. 1613 (2006) 2, 7, 8, 10
INS v. *Elias-Zacarias*, 502 U.S. 478 (1992) 7
INS v. *Ventura*, 537 U.S. 12 (2002) 2, 7, 8, 10
Mashiri v. *Ashcroft*, 383 F.3d 1112 (9th Cir. 2004) 5
Oforji v. *Ashcroft*, 354 F.3d 609 (7th Cir. 2003) 5
Sanchez-Trujillo v. *INS*, 801 F.2d 1571 (9th Cir. 1986) ... 6
Vermont Yankee Nuclear Power Corp. v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978) 9
Villalta, In re, 20 I.&N. Dec. 142 (BIA 1989) 5
Y-T-L-, In re, 23 I. & N. Dec. 601 (BIA 2003) 4

Statutes and regulations:

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1101(a)(42)(A) 1, 5
8 U.S.C. 1158(b)(1)(A) 1
8 U.S.C. 1158(b)(3)(A) (Supp. IV 2004) 2
8 U.S.C. 1231(b)(3)(A) 1
8 U.S.C. 1252(b)(4)(B) 7
REAL ID Act, Pub. L. No. 109-13, Div. B, § 101(a), 119 Stat. 302 1

Statutes and regulations—Continued: Page

8 C.F.R.:

Section 207.7(b)(6) 2
Section 208.21 2
Section 208.21(a)-(g) 2
Section 1208.13(b) 1
Section 1208.13(b)(1) 1, 8, 9
Section 1208.13(b)(2)(i)(A) 1
Section 1208.16(b)(1) 1
Section 1208.16(b)(2) 1

In the Supreme Court of the United States

No. 05-1401

ALBERTO R. GONZALES, ATTORNEY GENERAL, PETITIONER

v.

VICTORIA TCHOUKHROVA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The Immigration and Nationality Act is explicit: withholding of removal is available only to an alien if "*the alien's* life or freedom would be threatened." 8 U.S.C. 1231(b)(3)(A) (emphasis added). "[T]he applicant" thus must prove that "*his or her* life or freedom would be threatened," in that "*he or she* would be persecuted." 8 C.F.R. 1208.16(b)(1) and (2) (emphases added). There is no exception.

Similarly, an alien is eligible for asylum only if "such person" faces "persecution or a well-founded fear of persecution." 8 U.S.C. 1101(a)(42)(A); see REAL ID Act, Pub. L. No. 109-13, Div. B, § 101(a), 119 Stat 302 (to be codified at 8 U.S.C. 1158(b)(1)(A)); see generally 8 U.S.C. 1158(b)(1)(A). The applicant must prove that "*he or she* has suffered past persecution or * * * has a well-founded fear of future persecution." 8 C.F.R. 1208.13(b) (emphasis added); see 8 C.F.R. 1208.13(b)(1) and (b)(2)(i)(A). Congress carved out only one narrow exception to the rule that asylum claims must be justi-

fied with reference to the individual seeking asylum. A "spouse or child" of an alien may obtain asylum derivatively. 8 U.S.C. 1158(b)(3)(A) (Supp. IV 2004); see 8 C.F.R. 1208.21(a)-(g). A "parent" may not. 8 C.F.R. 208.21; cf. 8 C.F.R. 207.7(b)(6).

The Ninth Circuit significantly departed from that clear statutory and regulatory framework by announcing a new rule of derivative asylum and withholding of removal. The court did so by adopting a doctrine of derivative persecution—a doctrine that allows an alien to become eligible for asylum and withholding without personally suffering any persecution, as long as *someone else* faces persecution. As seven judges of the Ninth Circuit explained in dissenting from the denial of rehearing en banc, "[t]his is all very new law," Pet. App. 47a, on a matter of "exceptional importance with profound implications for our nation's immigration laws," *id.* at 42a. This Court's recent decision in *Gonzales* v. *Thomas*, 126 S. Ct. 1613 (2006) (per curiam), and its predecessor, *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam), make clear that such "basic asylum eligibility decision[s]" must be made by the agency in the first instance. *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 16). When, as here, a court "independently create[s] potentially far-reaching legal precedent," it "seriously disregard[s] the agency's legally mandated role." *Ventura*, 537 U.S. at 17.

1. Rather than defend the Ninth Circuit's latest departure from established principles of administrative and immigration law, respondents devote substantial effort to arguing that the court of appeals simply affirmed a "decision the agency actually made," Br. in Opp. 14, and "simply followed the agency's own analysis," *id.* at 18. That argument defies the very opinion it attempts to defend. The court of appeals acknowledged that the agency had never "discuss[ed] the question expressly" of whether "the harms suffered by a disabled child [could] be taken into account when determining whether to grant his parent's asylum application." Pet. App.

16a. And that absence of any consideration of the issue by the agency was one point of agreement between the panel and the judges who dissented from the denial of rehearing en banc. As the seven dissenting judges pointed out: "This exotic reading of the immigration statute was never discussed by the IJ, the BIA or even the parties—rather, it is something the panel comes up with on its own." *Id.* at 42a.

Indeed, if the court of appeals' adoption of a new pathway to derivative asylum or withholding by means of derivative persecution were as "unremarkable" and dictated by prior Board precedent as respondents contend (Br. in Opp. 21), one would have expected some reference to that argument by respondents before the immigration judge (IJ), the Board, or the court of appeals. But respondents never mentioned it. They argued to the IJ that the parent, Victoria Tchoukhrova, was the sole applicant for asylum, Admin. Rec. 73-74, as well as that she "experienced many acts of persecution" herself, and "attempts by the government to shut Respondent up in her attempts to politicize and publicize the deplorable conditions and treatment of children with disabilities in Russia." *Id.* at 174; see *id.* at 176, 180-181. They argued to the Board that Mrs. Tchoukhrova is eligible for asylum because "[s]he" has a well founded fear of persecution on account of "her" political opinion, membership in a particular social group, and religion. *Id.* at 21, 26, 29, 46; see *id.* at 29.

In the court of appeals, respondents' brief addressed at length the discrimination against the child, Resp. C.A. Br. 7-17, but that argument was expressly limited to establishing that "Evgueni Tchoukhrov belongs to a social group" and that "Evgueni Tchoukhrov"—not his parent—"has suffered past persecution and has a well-founded fear of future persecution," *id.* at 7, 10. Although Mrs. Tchouknrova was the sole applicant for asylum, Admin. Rec. 73-74, respondents devoted only a few pages at the end of the brief to arguing that she was persecuted, relying on the argument that "she was placed under constant pressure to give up their child." Resp. C.A.

Br. 18; see *id.* at 19. Nowhere did respondents argue that "the harms suffered by" Evgueni (Pet. App. 16a) could, in themselves, qualify his mother for asylum or withholding.[1]

Respondents' argument (Br. in Opp. 21) that the Board endorsed derivative asylum and withholding of removal through a rule of derivative persecution in *In re C-Y-Z-*, 21 I. & N. Dec. 915 (BIA 1997), is also wrong. In *C-Y-Z-*, the Board held that the husband of a woman who was involuntarily sterilized had been subjected to persecution. But the Board did so not by holding that the persecution of the wife could be extended derivatively to her husband. Rather, because the sterilization of a wife "in effect sterilizes her husband," Pet. App. 48a n.2 (Kozinski, J., dissenting from denial of rehearing en banc), the Board concluded that the "forced sterilization of one spouse * * * is an act of persecution against the other spouse" in his own right. 21 I. & N. Dec. at 919.[2]

Finally, respondents' argument that the Sixth Circuit has applied derivative persecution misreads *Abay* v. *Ashcroft*, 368 F.3d 634 (2004). That decision found that the potential genital mutilation of a child would result in persecution of the mother

---

[1] It is equally hard to reconcile respondents' argument that the court endorsed the Board's own supposedly "unremarkable" and already established rule of derivative persecution (Br. in Opp. 21) with respondents' other argument that the court did not decide anything at all about the issue. *Id.* at 19 (citing *Abebe* v. *Gonzales*, 432 F.3d 1037, 1043 (9th Cir. 2005) (en banc). In fact, five judges (including four who dissented from the denial of rehearing en banc in this case) explained in *Abebe* that, "by sleight of hand," the court had wrongfully "assume[d] that parents of a United States citizen child are nonetheless entitled to claim derivative asylum relief based on the possibility that their citizen child would be subjected to [female genital mutilation]," even though the law does not permit "parents [to] claim an unrecognized form of derivative relief when they themselves cannot establish entitlement to asylum." *Id.* at 1048 (Tallman, Kozinski, Rymer, Bybee, & Callahan, JJ., dissenting).

[2] See *In re Y-T-L-*, 23 I. & N. Dec. 601, 607 (BIA 2003) ("Coerced sterilization is better viewed as a permanent and continuing act of persecution that has deprived a *couple* of the natural fruits of conjugal life," and has denied the husband as much as the wife "the society and comfort of the child or children that might eventually have been born to *them*.") (emphases added).

directly because being "forced to allow the [genital] mutilation of her daughter * * * would cause [the mother] mental suffering sufficient to constitute persecution." *Id.* at 642; see *id.* at 645-646 (Sutton, J., concurring). The *Abay* court thus did not hold, as the Ninth Circuit did here, that persecution of a child alone was sufficient. The parent had to demonstrate that she personally would suffer persecution. Whatever the soundness of the Sixth Circuit's resolution of that distinct question in *Abay*, it does not support the Ninth Circuit's ruling here.[3]

The Seventh Circuit, moreover, has rejected the argument that a parent can "attach derivatively to the right" of her children to remain in the United States, holding that "there is no statutory or regulatory authority for [a parent] to have her own deportation suspended because she fears for her children if they return * * * with her." *Oforji* v. *Ashcroft*, 354 F.3d 609, 617 (2003).[4]

2. The court of appeals (Pet. App. 16a), echoed by respondents (Br. in Opp. 18-19), considered it permissible to adopt a new doctrine of derivative persecution because the IJ's oral decision had "treated the harms inflicted on the fam-

---

[3] Nor would it be sufficient to demonstrate mental anguish alone. The applicant would also have to demonstrate that the infliction of mental distress *on her* was "on account of" a protected characteristic—that is, her "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).

[4] Persecution of family members can corroborate an individual's own claims of persecution, see, *e.g.*, *Mashiri* v. *Ashcroft*, 383 F.3d 1112, 1120-1121 (9th Cir. 2004), and is also relevant if the persecution both caused serious mental anguish to the applicant and was undertaken because of the persecutor's motive to punish or persecute the applicant himself. Cf. *In re Villalta*, 20 I. & N. Dec. 142, 147 (BIA 1990). Further, once an alien has established eligibility for asylum—by demonstrating personal persecution—the Attorney General can weigh the treatment of family members in exercising his discretion to grant asylum. *In re Chen*, 20 I. & N. Dec. 16, 21 (BIA 1989). But those propositions are quite different from the Ninth Circuit's holding in this case that an alien who has not endured any persecution can become eligible for relief simply by substituting in the persecution of another. See Pet. App. 48a n.2.

ily members cumulatively" (Pet. App. 16a). That provides no justification for the court's disregard of the established principles of administrative primacy reflected in *Thomas* and *Ventura*.

First, the court "rips" the IJ's references "out of context." Pet. App. 49a. As the seven dissenting judges explained (*ibid.*), "it is clear that [the IJ] treated the harms to the family cumulatively only for purposes of determining whether the social group in question—here, the family of a disabled child—was persecuted" and was, in fact, a cohesive social group. Once the IJ found that the social group's defining characteristic had not been a basis for "persecution," there was no reason for the IJ to go further and address whether Mrs. Tchoukhrova herself had been persecuted on account of her membership in that group. See *ibid.*

Indeed, respondents had argued to the IJ that, under controlling Ninth Circuit precedent, the question whether "the group [has] been targeted because of [its] characteristic[s]" is one of the "criteria" for establishing Mrs. Tchoukhrova's membership in a protected social group. Admin. Rec. 180 (citing *Sanchez-Trujillo* v. *INS*, 801 F.2d 1571, 1574-1575 (9th Cir. 1986)). That is the context in which the IJ's oral decision discussed the harm suffered not only by Mrs. Tchoukhrova, but also her husband and child. See Pet. App. 37a, 39a. Because respondents advocated that framework for decision, they are now ill-positioned to portray the IJ's response as the *sub rosa* resolution of an entirely different legal question. Nor did the Board adopt that broad new rule of immigration law by summarily affirming the IJ's decision.

More fundamentally, the rule that courts should permit the Board to resolve sensitive questions of immigration law in the first instance is not some mere technical hurdle or procedural nuisance to be pushed aside because a court wishes—as the Ninth Circuit openly acknowledged here—to avoid the consequences of the statutorily "limited scope of derivative asylum applications." Pet. App. 17a-18a. *Ventura*'s and

Thomas's requirement of judicial restraint and deference are rooted in fundamental principles of separated powers and Executive Branch primacy in making the "highly complex and sensitive" foreign and domestic policy judgments that pervade immigration law. *Ventura*, 537 U.S. at 17. As a consequence, an agency's arguable allusion to one issue in the context of resolving a distinct issue is not a basis for ignoring *Ventura* and *Thomas*.

After the court found fault in the Board's determination that the past conduct and acts of discrimination were not "persecution"—a ruling that was also erroneous, see Pet. 17-18 & nn. 4, 5—"the proper course * * * [was] to remand to the agency for additional investigation or explanation." *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 16).[5] The

---

[5] Respondents' attempt to defend of the court of appeals' outright reversal of the Board on the past persecution issue (Br. in Opp. 28-29) is without merit, for the record by no means compels a finding of "persecution." See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481-482 & n.1 (1992); 8 U.S.C. 1252(b)(4)(B). That is especially true given the IJ's express determination that Mrs. Tchoukhrova "exaggerated facts" and stated "broad opinions about possible past persecution" that "were not supported by fact." Pet. App. 33a. Although respondents repeatedly assert that Evgueni was discarded as medical waste after he was born (see Br. in Opp. 2 & n.1, 20, 28-29), they do not acknowledge Mrs. Tchoukhrova's explanation for that incident—namely, that the personnel who delivered the baby "assumed he was dead." Admin. Rec. 201. It presumably is for that reason that Mrs. Tchoukhrova did not mention the incident in her oral testimony before the IJ, and that respondents did not rely upon it in their submissions to the IJ or the Board. See Pet. 17 n.4. Accordingly, neither the IJ nor the Board had any occasion to comment upon it. Similarly, respondents' characterization of the two physical incidents (see Br. in Opp. 4, 28) goes significantly beyond Mrs. Tchoukhrova's testimony, which plainly does not compel respondents' evident assertion (*ibid.*) that either the young men in the park or the woman hanging her laundry intended to injure Evgueni, much less that they intended to do so because of his disability. See Pet. 7-8, 17 n.4; Pet. App. 36a. Respondents' reliance (Br. in Opp. 4) on allegedly inadequate medical treatment and education is also misplaced: Evgueni continued to receive medical treatment while in Russia, his parents were permitted to leave on three occasions to obtain treatment abroad, and he was given home instruction. See Pet. 7, 18 n.5; Pet. App. 35a, 39a. If the court

agency should be afforded the opportunity to "bring its expertise to bear upon the matter" and to "make [the] initial determination" for which Congress tasked it. *Ibid.* (quoting *Ventura*, 537 U.S. at 17). As in *Ventura* and *Thomas*, the court of appeals ignored those well-established limits on its role. As in *Ventura* and *Thomas*, the consequence of the agency's disregard was the adoption of a far-reaching rule "of exceptional importance with profound implications for our nation's immigration laws." Pet. App. 42a. And, as in *Ventura* and *Thomas*, that usurpation of agency authority should be summarily reversed.

3. As noted in the petition, the court of appeals multiplied its violation of the "ordinary 'remand' rule," *Thomas*, 126 S. Ct. at 1615; *Ventura*, 537 U.S. at 18, by not only adopting a doctrine of derivative persecution, but also holding that a finding of such derivative persecution gives rise to a presumption that the individual herself faces a well-founded fear of future persecution (despite never personally being persecuted in the past), and precluding the government from rebutting that newly triggered presumption with evidence of changed circumstances for the mother or child, changed country conditions, or the viability of internal relocation. Pet. App. 25a-26a.

Respondents' only answer is to argue that the government waived those issues by not raising them before the agency or the court of appeals. But, as the petition explained (at 19), the government did not rebut the presumption of a well-founded fear of persecution because that presumption (and the process of rebutting it) only arises after persecution of the *applicant* "has been found" by the IJ. 8 C.F.R. 1208.13(b)(1). No such finding was ever made, so there was never any presumption to rebut. The IJ, moreover, directed the parties to focus on

---

of appeals nonetheless believed that the foregoing factual issues warranted additional consideration, the proper course was to remand to the Board for that purpose, not to provide supplemental factual findings on appeal.

the persecution question. Admin. Rec. 80.[6] Respondents cite no Board authority at all, nor is the government aware of any, for their proposed rule that the agency's failure to make an offer of proof in an administrative proceeding on issues that never arose and did not need to be decided forfeits those arguments. Nor do respondents explain how such a rule would be workable in the already overburdened immigration administrative process.[7]

Beyond that, respondents overlook the distinct *legal error* committed by the Ninth Circuit in holding that derivative persecution triggers the same presumption of future persecution that arises when an applicant demonstrates individualized persecution. The operative regulation requires the individual applicant to establish that "*he or she* has suffered persecution in the past," and the presumption only arises after the alien has established "*such* past persecution." 8 C.F.R. 1208.13(b)(1) (emphases added). Whether that presumption should apply (or even makes sense) and how it should be rebutted when the persecution is purely derivative are questions that the Board has never considered, and that the government could not have anticipated.

Respondents note (Br. in Opp. 22) that the government discussed *Ventura* in its brief to the panel in terms of the question whether persecution was "on account of" a protected status, and fault the government for not also listing all of the follow-on issues. But the "on account of" question for which the government sought remand stood at the gateway to all of those other questions. Issues concerning the presumption

---

[6] Before the Board, the government represented only that the IJ's decision was dispositive "of all issues *regarding the respondent's appeal*." Admin. Rec. 17 (emphasis added). The government did not waive argument on or rebuttal of issues never decided by the IJ or argued by respondents to the Board.

[7] In any event, the decision whether to adopt the cumbersome rule of agency procedure that respondents urge is a policy determination for the Attorney General or the Board, not the courts, to make. *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-525 (1978).

and its rebuttal could not arise, if at all, until *after* the "on account of" question was decided *by the Board on remand.* The request for a *Ventura* remand on the question of whether any persecution was "on account of" a protected ground thus necessarily subsumed a remand of any and all questions that could arise only after resolution of that issue *on remand.*

4. Finally, respondents emphasize throughout their brief the extraordinary challenges that respondent and her child have faced and overcome. But the unfortunate reality is that heart-wrenching cases of aliens whose lives would be significantly improved by living in this Country arise by the thousands every year. Of necessity, hard choices must be made, and difficult lines must be drawn. Congress has chosen to limit relief from removal, with a very narrow exception, to individuals who have personally suffered or fear persecution. Furthermore, alternative avenues are available to permit the family members of children who have suffered persecution to remain in the Country. See Pet. 21-22. Congress has tasked the Executive Branch, not the courts, with interpreting that law and making the basic eligibility decisions within that statutory framework in the first instance in both sympathetic and unsympathetic cases.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted and the judgment below summarily reversed. In the alternative, the judgment should be vacated and the case remanded for further consideration in light of *Gonzales* v. *Thomas*, 126 S. Ct. 1613 (2006).

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

AUGUST 2006